

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

JOHN TENNISON,

Plaintiff,

v.

CITY AND COUNTY OF SAN FRANCISCO; SAN
FRANCISCO POLICE DEPARTMENT; PRENTICE
EARL SANDERS; NAPOLEON HENDRIX; and
GEORGE BUTTERWORTH,

Defendants.

ANTOINE GOFF,

Plaintiff,

v.

CITY AND COUNTY OF SAN FRANCISCO; SAN
FRANCISCO POLICE DEPARTMENT; PRENTICE
EARL SANDERS; NAPOLEON HENDRIX; and
GEORGE BUTTERWORTH,

Defendants.

No. C 04-0574 CW
Consolidated with
No. C 04-1643 CW

AMENDED ORDER
GRANTING IN PART
DEFENDANTS'
MOTIONS FOR
SUMMARY JUDGMENT
AND DENYING
PLAINTIFFS'
MOTION TO STRIKE
AND PLAINTIFFS'
MOTIONS FOR
SUMMARY
ADJUDICATION

This is a civil rights action arising from the investigation,
arrest and prosecution of Plaintiffs John Tennison and Antoine Goff
by Defendants Prentice Earl Sanders, Napoleon Hendrix (together,
the Inspectors) and George Butterworth. Plaintiffs have filed
motions for partial summary adjudication of their Brady claims
against the Inspectors; the Inspectors oppose and cross-move for

1 summary judgment on all of Plaintiffs' claims. Butterworth moves
2 separately for summary judgment. The Inspectors move under Civil
3 Local Rule 56-2(a) to submit a statement of disputed facts.
4 Tennison moves to strike certain portions of the Inspectors'
5 declarations. Goff joins in the motion to strike. The Inspectors
6 have not filed an opposition to the motion to strike. The matters
7 were heard on August 12, 2005. Having considered the papers filed
8 by the parties and oral argument on the motions, the Court GRANTS
9 in part Butterworth's and the Inspectors' motions for summary
10 judgment and DENIES Plaintiffs' motion to strike, Plaintiffs'
11 motions for summary adjudication and the Inspectors' request to
12 submit a statement of disputed and undisputed facts.

13 PROCEDURAL BACKGROUND

14 On October 3, 1990, Plaintiffs, whose cases had been
15 consolidated for trial, were convicted by a jury of first degree
16 murder and conspiracy to commit murder in the shooting death of
17 Roderick Shannon. Wong Dec., Ex. V. In the Matter of the Claim for
18 Compensation by Antoine Maurice Goff and John J. Tennison, November
19 4, 2004 decision of the California Victim Compensation and
20 Government Claims Board (Matter of Goff and Tennison). Each
21 Plaintiff individually filed a motion for a new trial, both of
22 which were denied. Each Plaintiff individually filed a direct
23 appeal and then a petition for a writ of habeas corpus. The State
24 courts denied the direct appeals and the habeas petitions. Each
25 Plaintiff individually filed a petition for writ of habeas corpus
26 in this Court. On August 26, 2003, this Court issued an Order
27 Granting Tennison's Petition for Writ of Habeas Corpus based upon
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1 the suppression of material exculpatory evidence. Purcell Dec.,
2 Ex. 52, August 26, 2003 Habeas Order. Although the Court had not
3 ruled on Goff's petition, both Plaintiffs were released from
4 custody. The San Francisco district attorney decided not to retry
5 them. Purcell Dec., Exs. 53, 54; Goff Dec. ¶ 7; Exhibits B and C
6 submitted with Tennison's Complaint, October 27, 2003 State Court
7 Order declaring Tennison factually innocent of the murder of
8 Roderick Shannon. In 2004, Plaintiffs brought claims pursuant to
9 California Penal Code § 4900¹ against the State of California
10 seeking compensation for alleged wrongful incarceration. Wong
11 Dec., Ex. V, Matter of Goff and Tennison. The Administrative Law
12 Judge of the Victims' Compensation Board ruled that Plaintiffs had
13 failed to establish by a preponderance of the evidence that they
14 were entitled to compensation and their claims were denied. Id. at
15 10. Tennison has appealed this decision to the California superior
16 court. Balogh Dec. at ¶ 42. Tennison's attorney anticipates that
17 the losing party will appeal the superior court's decision to the
18 California court of appeal. Id.

19 FACTS

20 I. Pre-Trial Events -- Masina Fauolo and Pauline Maluina

21 On August 19, 1989, Shannon was shot and killed in San
22 Francisco. San Francisco Homicide Inspectors Sanders and Hendrix

23
24 ¹California Penal Code § 4900 et seq. provides the statutory
25 basis for the filing of a claim for injury sustained as a result of
26 an erroneous conviction and incarceration. The claimant must prove
27 by a preponderance of the evidence that the "crime was not
28 committed by him, the fact that he did not, by any act or omission
on his part, either intentionally or negligently, contribute to the
bringing about of his arrest or conviction for the crime with which
he was charged. . ." Cal. Penal Code § 4903.

1 had been assigned to focus on gang-related murders and worked with
2 the Gang Task Force (GTF) with respect to any gang-related
3 homicide. The GTF was a group of officers in the San Francisco
4 police department charged with stopping gang activity generally.
5 Sanders and Hendrix headed the Shannon homicide investigation
6 assisted by GTF members Michael Lewis, Neville Gittens and Leroy
7 Lindo.

8 The evidence indicated that there had been a high-speed car
9 chase that had ended with Shannon taking the evasive action of
10 driving his car in reverse and then crashing his car backwards into
11 a park fence along Visitacion Avenue. One of the chasing vehicles
12 was a pick-up truck that had gone into reverse to chase Shannon's
13 car as it was driving in reverse. Residents in the neighborhood of
14 the shooting identified several cars involved in the chase, but
15 could not identify any of the people involved. The morning after
16 the crash, SFPD Inspector Frank Falzon interviewed the owner of the
17 car Shannon had been driving during the chase: his cousin, Patrick
18 Barnett. Balogh Reply Dec., Ex. 91, August 19, 1989 Barnett
19 Interview at 1. Falzon told Barnett that two cars and a large-
20 sized pick-up truck were involved in the chase and asked him to
21 find a witness to the murder. Id. at 15-16.

22 On August 22, 1989, Masina Fauolo, an eleven-year old Samoan
23 girl who lived in the Sunnydale section of San Francisco, called
24 Hendrix and told him she had witnessed Shannon's killing. She
25 later described Shannon and herself as buddies, like brother and
26 sister. Over the next two months, Hendrix spoke to Masina every
27 day.

1 On October 4, 1989, Hendrix and Sanders submitted the
2 following memorandum to their supervisor, Lieutenant Gerald J.
3 McCarthy: "In order to encourage witnesses to come forward [in the
4 Shannon homicide case], we request a reward of \$2,500 from the
5 Secret Witness Program. We feel this reward will generate
6 information that will lead to the arrest and conviction of the
7 perpetrator(s) of the homicide." Purcell Dec., Ex. 22, October 4,
8 1989 Memo. The Secret Witness Program (SWP) was a community-based
9 reward fund that was administered by the San Francisco Chamber of
10 Commerce (COC) in the 1980s to encourage individuals to provide
11 confidentially information that would assist the police in solving
12 crimes in San Francisco. Tabak Dec. at ¶ 4. Individuals could
13 call the COC's hotline to provide such information. Id. Also, at
14 the request of the SFPD, the COC would post rewards for information
15 leading to the arrest, prosecution and conviction of criminal
16 suspects. Id. Any reward payment would be made directly by the
17 COC to the individual who provided the information, not to police
18 officers. Id. The SFPD did not fund the SWP. Id. A request that
19 a reward be posted by the SWP had to be approved by the requesting
20 officer's superior officers, then forwarded to the COC for its
21 consideration. Id.²

22 Hendrix and Sanders' request for a SWP reward was approved by
23 three people. An undated copy of a note addressed to McCarthy,
24 Hendrix and Sanders, which is xeroxed over the October 4, 1989
25 memo, reads, "Jerry: Per Mary Petrie, this request has been taken
26

27 ²The SWP was discontinued in 1992. Tabak Dec. at ¶ 4.
28

1 care of and the reward is in place." The memo was not turned over
2 to Plaintiffs' trial attorneys.

3 Sanders testified that he didn't personally give the SWP memo
4 to Butterworth, the assistant district attorney handling the case,
5 but that it was in the police case file³ and if Butterworth had
6 asked for the file, he would have seen it. Purcell Dec., Ex. 51,
7 Sanders Depo. at 129-31. Asked whether he had informed the
8 assistant district attorney about his request to the SWP, Hendrix
9 replied, "I don't know that I did." Purcell Dec., Ex. 1, Hendrix
10 Depo. at 25. Butterworth did not know of this memo and he did not
11 produce it to Plaintiffs' defense counsel. Purcell Dec., Ex. 42,
12 Butterworth Depo. at 100. Plaintiffs' defense counsel never
13 learned of this request. Purcell Dec., Ex. 41, Adachi Dec. at ¶ 7;
14 Melton Dec. at ¶ 5. Masina and Pauline Maluina, the other witness
15 against Tennison, testified that they did not receive any money for
16 testifying against Plaintiffs. Wong Dec., Ex. UU, Masina Dec. at ¶
17 8-10; Wong Dec., Ex. M, Pauline Depo. at 137, 139.

18 Neither the SFPD nor the COC has been able to locate any
19 witnesses or records indicating that a reward was ever offered or

20
21 ³The Bureau of Investigations of the SFPD maintains an
22 investigative case file for all cases under investigation. Tabak
23 Dec., Ex. A at 25 (December 23, 1985 SFPD Memo on Investigative
24 Case File Management). Each case file must contain a Chronological
25 Report of Investigation which lists all pertinent facts needed to
26 document the investigation and to substantiate conclusions or
27 recommendations, including exculpatory evidence. *Id.* at 27. The
28 case file is maintained in the possession of the investigating
officer, in the investigating officer's desk or in the section case
file cabinets. *Id.* at 35 (March 7, 1990 SFPD Memo on Processing Of
Cases Referred to Inspectors Bureau). At some point the
investigation file or a copy of it, including all exculpatory
information, is turned over to the district attorney's office.
Balogh Reply Dec., Ex. 81, Tabak Depo. at 99-100.

1 paid to anyone in connection with the Shannon murder investigation.
2 Tabak Dec. at ¶ 5. No record indicates that any SWP reward funds
3 were ever paid to Hendrix or Sanders in any case. Id.

4 On October 11, 1999, Sanders received a check in the amount of
5 \$1,250 from the SFPD's Contingent Fund B for the purpose of
6 "witness expenses." Purcell Dec., Ex. 23, October and December,
7 1989 Ledger Pages for Contingent Fund B. On December 1, 1989,
8 Hendrix received a check in the amount of \$160 from Contingent Fund
9 B for the purpose of a "witness agreement." Id. Contingent Fund B
10 is a discretionary fund the Chief of Police uses in the
11 investigation and detection of crime. Goldberg Dec. at ¶ 3. The
12 Chief of Police or his designee must approve all reimbursements and
13 advances to police officers paid from this fund. Id. All requests
14 for payments from Contingent Fund B must be documented and the
15 documentation must be routed through the chain of command to the
16 Chief of Police for approval. Id. This procedure was in effect in
17 1989 and has not changed since then. Id. Defendants' witness
18 declares that Contingent Fund B has never been used for rewards,
19 and that the payments noted in the ledger were for witness expenses
20 unrelated to the October 4, 1989 memo requesting a reward from the
21 SWP. Goldberg Dec. at ¶ 5.

22 In a 2005 declaration, Masina states that she moved to Samoa
23 shortly after Shannon was killed and that, as far as she knows, her
24 transportation expenses to fly from Samoa to San Francisco for the
25 preliminary hearings and trial were paid by the SFPD. Wong Dec.,
26 Ex. UU, Masina Dec. at ¶ 14.

27 The Fiscal Division has worked diligently to try to locate
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1 all supporting documentation for the October payment to Sanders and
2 the December payment to Hendrix, but it has only been able to
3 locate bank statements; the request memos, cancelled checks and any
4 related receipts could not be found. Id. The documents were
5 likely destroyed years ago as part of the SFPD's standard
6 documentation retention and destruction policy. Id.

7 The information about the Contingent Fund B disbursements was
8 not given to Plaintiffs' trial attorneys.

9 In an October 31, 1989 recorded interview with Hendrix and
10 Sanders, Masina told them the following information. Purcell Dec.,
11 Ex. 26. After midnight on August 19, 1989, Masina and her friend
12 Pauline Maluina were parked in the Lovers' Lane parking lot at the
13 top of Visitacion Avenue in a stolen car eleven-year old Masina was
14 driving. Masina said she saw three cars and a truck enter the
15 parking lot. The drivers and the passengers in the vehicles were
16 young, African American men. She heard one boy say to another,
17 "Buck, come here." After the cars had been parked for about ten
18 minutes, Shannon's car went by on Visitacion. Then the three cars
19 and the truck left the parking lot and began to chase Shannon in
20 the car he was driving. Masina drove out of the parking lot and
21 followed the cars down the hill without losing sight of Shannon's
22 car. She said she parked the stolen car on the street near where
23 Shannon had crashed his car and ran to a Super Fair parking lot.
24 She got separated from her friend Pauline at this point. At the
25 Super Fair parking lot, she saw Shannon being beaten by a gang of
26 boys. Then one boy went to the trunk of his car and got a shotgun.
27 Masina heard four or five shots, saw the boy shoot at Shannon, but
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1 didn't know whether any of the shots hit Shannon or were shot in
2 the air. After Shannon was shot, all the boys got back in their
3 cars and left. Masina then went to Shannon who said, "Get
4 Patrick." Then Masina left the scene.

5 At the interview, Sanders showed Masina eight photographs.
6 From them she picked two, one of Tennison and one of Goff. Masina
7 said that Tennison was one of the boys who were beating Shannon and
8 Goff was the person who shot Shannon.

9 On November 28, 1989, Hendrix located Masina's friend,
10 fourteen-year old Pauline Maluina, at Visitacion Valley High School
11 and interviewed her in the presence of her father and the
12 principal. Purcell Dec., Ex. 29, November 28, 1989 Police
13 Interview with Pauline Maluina. At the interview, Pauline told
14 Hendrix that she and Masina were walking around and saw some people
15 beating up somebody. Then Shannon "came out looking all
16 frightened. All of a sudden there's a car right next to them.
17 Someone got the gun and shot him right there and me and Masina we
18 just ran and we hopped on a bus. We went down 24th and Mission."
19 Id. at 2. She and Masina were walking and talking slowly. Id. at
20 4. Right after one shot was fired, she and Masina ran because they
21 thought the shooter was going to point the gun at them and shoot
22 them. Id. at 5.

23 At the interview, Hendrix showed Pauline eight San Francisco
24 police ID-type photos. Pauline identified two of the people in the
25 photos as being at the scene. One of the people she picked was
26 Tennison. She said he was not the person who was in charge of the
27 shotgun. Id. at 13. The other person Pauline identified was an
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1 individual named Wayland Gibson, who was also known as "Buck." Id.
2 at 12.

3 Hendrix and Sanders brought the case to the San Francisco
4 District Attorney's Office, which decided to prosecute Plaintiffs.
5 On November 28, 1989, a warrant was issued for the arrest of Goff;
6 on December 1, 1989, a warrant was issued for the arrest of
7 Tennison.

8 The case against Plaintiffs was originally prosecuted by
9 Assistant District Attorney Al Giannini. In December, 1989,
10 Giannini filed a California Welfare and Institutions Code § 707
11 petition to have Tennison referred to adult court for prosecution
12 in the Shannon homicide. Kaiser Dec., Ex. B, May 24, 1990
13 Butterworth Declaration. On February 21, 1990, the case was
14 transferred to Assistant District Attorney Butterworth. The
15 section 707 hearing took place on March 27, 1990 and April 2, 1990;
16 Hendrix and Pauline testified. Tennison's attorney, San Francisco
17 Assistant Public Defender Jeff Adachi cross-examined them. The
18 petition was granted. Tennison was arrested on April 5, 1990.
19 Tennison's preliminary hearing was set for April 23, 1990. Goff
20 was arraigned on April 9, 1990 and his preliminary hearing was set
21 for May 1, 1990.

22 On April 22, 1990, the day before Tennison's preliminary
23 hearing, Pauline arrived from Hawaii, where she was then living, to
24 meet with Butterworth before she testified at the hearing. Kaiser
25 Dec., Ex. B, May 24, Butterworth Dec. at 1. Pauline, her mother,
26 Butterworth and Hendrix were at the meeting. Kaiser Dec., Ex. A,
27 Butterworth Depo. at 162. Butterworth had asked Pauline to come to
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1 the meeting to prepare her for her testimony at the preliminary
2 hearing. Id. Butterworth had Pauline read the testimony she gave
3 at Tennison's section 707 hearing and told her there were
4 discrepancies between what she had testified to and what Masina had
5 said in her tape-recorded interview with the police. Purcell Dec.,
6 Ex. 30, April 23, 1990 Police Interview of Pauline Maluina at 2.
7 Pauline then told Butterworth that she had not been at the scene of
8 Shannon's homicide. Id. She said that she had lied "because she
9 didn't want to get into any more trouble" and she owed Masina
10 something. Id. at 2, 4. Pauline said that she had been able to
11 pick out Tennison's photo from the photos Hendrix had shown her at
12 the November, 1989 interview "because Masina told me to pick the
13 one that looked the biggest, and the largest one out of all the
14 pictures." Id. at 3. Pauline also said that she learned all the
15 details of Shannon's shooting from Masina before she spoke to
16 Hendrix in November. Id. at 4. After he heard Pauline's
17 recantation, Butterworth sent Pauline and her mother back to their
18 hotel. Wong Dec., Ex. O, Butterworth Depo. at 178. Then
19 Butterworth spoke with Hendrix and they decided to bring Pauline
20 back the next day to see if she would still say that she wasn't at
21 the murder scene. Id.

22 The next day, April 23, 1990, Pauline returned with her
23 mother. Id. Butterworth told Pauline that, based upon what she
24 had said the previous day, he wanted to do a follow-up interview
25 which was going to be tape-recorded. Id. at 190. Butterworth told
26 Pauline, "Do you understand that based upon what you told Inspector
27 Hendrix and myself yesterday, that the case against Mr. Tennison
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1 has been compromised and as a result, uh, we're not going to be
2 able to proceed with the preliminary hearing or with the
3 prosecution at this point? Do you understand that?" Purcell Dec.,
4 Ex. 30, April 23, 1990 Police Interview of Pauline Maluina at 6.
5 Pauline responded that she did understand. Id. Butterworth asked,
6 "And is the reason you are telling us the information you are
7 telling us today because that's the truth or is it just because you
8 are afraid to testify against Mr. Tennison?" Id. Pauline
9 responded, "It's the truth." Id.

10 After this interview, Butterworth dismissed the case against
11 Tennison and then had a conference with other members of the
12 homicide unit of the district attorney's office, including the head
13 of the unit, to decide how to proceed. Wong Dec., Ex. O,
14 Butterworth Depo. at 192. During that meeting, it was determined
15 that Pauline would be given a polygraph test. Id. at 194. The
16 goal of the polygraph was to see if, in the face of the polygraph
17 examination, Pauline would persist in her claim that she had not
18 been at the scene of Shannon's murder. Id. at 194. Another
19 decision that was made was to talk to Masina. Id. at 197.

20 On April 23, 1990, Hendrix called Masina who was then living
21 in Samoa. Balogh Reply Dec. at ¶ 7, Ex. 59, photocopies of two
22 audiotapes labeled "Masina Fauolo 4/23/90" and "M. Fauolo 4/23/90."
23 These are two copies of an original audiotape of Hendrix and
24 Masina's conversation. These copies were not produced to
25 Plaintiffs' trial counsel nor were they produced in response to
26 subpoenas issued in Tennison's federal habeas case. Balogh Dec. at
27 ¶ 7. They were produced from Butterworth's files in December,
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1 2004, in response to Tennison's subpoena in this case. Id. The
2 original audiotape of Hendrix' conversation with Masina has never
3 been produced. Id.⁴

4 Plaintiffs employed forensic audio expert Richard Sanders to
5 enhance the sound quality of the audiotapes because they are
6 difficult to hear. Richard Sanders Dec. at 1. Only Hendrix' voice
7 can be heard on the audiotapes. Id. at 5. Even with the
8 enhancement, only about one-third of Hendrix' conversation contains
9 recognizable words. Id. Richard Sanders made a transcript of the
10 audible portion of the tape. Id. He states that the only
11 knowledge he had when making the transcript was the names of the
12 people who might be involved in the discussion. Id. About ten
13 minutes into the audiotape, the words, "Can you ever see this
14 reward?" can be heard. Id., Ex. 2, Transcript of Audiotape at 3,
15 line 10:58.

16 The Inspectors employed audio expert Durand R. Begault to
17 review Richard Sanders' declaration and its attached exhibits.
18 Begault Dec. at ¶ 5. Begault states that even with enhancement of
19 the tape, except for an occasional word or phrase such as "OK" or
20 "JJ," it is mostly impossible to determine reliably what exact
21 words Hendrix is saying. Id. at ¶ 14. Begault states that the
22 word "reward" is not spoken anywhere on the tape and thus Richard

23
24 ⁴Tennison indicates that, because this evidence was only
25 produced in response to the subpoena in this case, allegations that
26 the Inspectors suppressed the tape of Hendrix' April 23, 1990
27 conversation with Masina is not included in his complaint.
28 Tennison argues that he informed the Inspectors of this Brady claim
in his responses to their interrogatories and, because the
Inspectors have not moved for summary judgment on this claim, it
remains for trial.

1 Sanders' transcript of the tape is inaccurate. Id. at 18.

2 Begault's best estimate of the phrase Richard Sanders transcribes
3 as, "Can you ever see this reward" is "Have you ever seen this
4 before?" Begault's colleague heard, "Have you ever seen this one?"

5 On April 24, 1990, Pauline returned to the police station
6 without her mother and she was given a polygraph test. Kaiser
7 Dec., Ex. 1, Butterworth Depo. at 202. Butterworth had a few brief
8 words with Pauline before she was polygraphed, but they did not say
9 anything of substance. Id. Butterworth did not speak to Pauline
10 after the polygraph. Id. SFPD Inspector Henry Hunter administered
11 the polygraph. Purcell Dec., Ex. 33, April 27, 1990 Memorandum
12 from Henry Hunter to Hendrix and Sanders. Pauline responded to
13 Hunter's questions by saying that she had not witnessed the Shannon
14 murder and that Masina had told her to lie about being there. Id.
15 Hunter determined that the polygraph results were inconclusive.
16 Id. Hunter told Pauline that if she had changed her original story
17 because of fear of retaliation, she should not do so because the
18 police would give her protection. Id. Hendrix placed Hunter's
19 memo summarizing the results of Pauline's polygraph in the police
20 case file which was available to Butterworth. Hendrix Dec. ¶ 22.
21 Butterworth testified that he never saw the memo. Wong Dec., Ex.
22 O, Butterworth Depo. at 207. Butterworth testified that he told
23 Jeff Adachi, Tennison's defense counsel, about the polygraph. Id.
24 Butterworth could not remember if he told Barry Melton, Goff's
25 defense counsel, about the polygraph. Id. at 208. Adachi declares
26 that he was not made aware that Pauline was subjected to a
27 polygraph examination. Adachi Dec. at ¶ 12.

1 After the polygraph, Hendrix put Pauline in a private room and
2 arranged for her to talk by phone to Masina, who was in Samoa.
3 Hendrix Dec. at ¶ 23. Hendrix left Pauline in the room alone to
4 talk to Masina and did not monitor or record the call. During the
5 call, Masina got mad at Pauline and told her how stupid she was.
6 Purcell Dec., Ex. 31, Pauline's Trial Testimony at 194. After
7 Pauline talked to Masina, Pauline retracted her recantation.
8 Hendrix Dec. at ¶ 23. On April 24, 1990, Hendrix and Sanders
9 interviewed Pauline on tape and documented the retraction of her
10 recantation. Id.; Purcell Dec., Ex. 34, April 24, 1990 Police
11 Interview with Pauline Maluina. Hendrix and Sanders gave this tape
12 to Butterworth. Hendrix Dec. at ¶ 23.

13 In a declaration dated June, 2003, Pauline states that, during
14 the phone call, Masina pressured her to return to her earlier,
15 untrue statements and told Pauline additional details about the
16 false testimony she wanted Pauline to give. June, 2003 Maluina Dec.
17 at ¶ 14. At her deposition, Pauline stated that, although Masina
18 had never hurt or threatened her, Pauline had seen the damage
19 Masina had done to other people and she didn't want that happening
20 to her. Wong Dec., Ex. M, Maluina Depo. at 249-50. Pauline stated
21 that Masina told her to tell the truth, but Pauline interpreted
22 Masina as saying "tell my truth." Id. at 282-83.

23 Pauline testified that, when Butterworth first heard that she
24 was recanting her prior testimony, he got upset and yelled, "How
25 could you say that you weren't there? You told us that you were
26 there." Id. at 79. Later, she clarified that Butterworth got
27 upset and raised his voice like a parent talking to his child. Id.

1 at 77, 88-89. She also said that Butterworth looked frustrated and
2 then he called in Hendrix. Id. at 78. Pauline said that
3 Butterworth and Hendrix pushed her toward going back to her
4 original testimony by not listening to her when she told them she
5 was not at the murder scene. Id. at 96. She felt that Butterworth
6 and Hendrix did not protect her in that they did not listen to her.
7 Id. at 371-72. Pauline testified that she had asked to take a
8 polygraph test. Id. at 94.

9 Tennison's preliminary hearing was held on June 18, 1990.
10 Achiron Reply Dec., Ex. D. Only Masina testified, but the court
11 heard testimony that Pauline had recanted and that Masina had
12 spoken to her after she recanted. Id. at 105. Tennison
13 Preliminary Hearing at 104-05. At Goff's preliminary hearing,
14 Butterworth called only Masina, but Goff called Pauline as a
15 defense witness. Achiron Reply Dec., Ex. C, Goff Preliminary
16 Hearing at 101-11. Pauline was examined on the discrepancies
17 between her testimony and Masina's, her recantation and her
18 telephone call to Masina regarding her recantation. Id. The
19 court, in both cases, found probable cause. Id. at 118-19; Achiron
20 Reply Dec., Ex. D, Tennison's Preliminary Hearing at 118-19.

21 Masina and Pauline testified at Plaintiffs' consolidated
22 trial. On October 3, 1990, a jury found Plaintiffs guilty of
23 murder and conspiracy to commit murder.

24 II. Pre-Trial Events -- Chante Smith

25 On January 3, 1990, Chante Smith contacted Sanders. Purcell
26 Dec., Ex. 45, Sanders' notes of January 3, 1990 Smith conversation;
27 Sanders Dec. ¶ 9; Wong Dec. Ex. F, Matter of Goff and Tennison,

1 Transcript of Administrative Hearing (Transcript of § 4900 Hearing)
2 at 87. Smith said she had information that she had heard on the
3 street and she provided Sanders with a list of names of people she
4 had heard were at the scene of the Shannon murder, including a
5 person named Luther Blue. Sanders Dec. ¶ 9; Smith Dec. ¶ 8, Wong
6 Dec., Ex. F, Transcript of § 4900 Hearing at 87. Smith also said
7 that Sanders had arrested the wrong people and that Lavinsta
8 Ricard⁵ had shot Shannon. Smith Dec. ¶ 8. Smith also told Sanders
9 that the car chase started at the Seven-Eleven store, which is
10 located east of the Super Fair Market where Shannon was shot,
11 whereas Lovers' Lane, where Masina and Pauline had said the car
12 chase started, is located west of the Super Fair Market. Smith
13 Dec. ¶ 8; see Purcell Dec., Ex. 20, Map. Smith also described
14 several of the cars involved in the car chase. Smith Dec. ¶ 8.
15 Years later, on July 24, 1992, Smith told Butterworth and Sanders
16 that she had actually witnessed Shannon's murder. Purcell Dec.,
17 Ex. 47, Chante Smith's July 24, 1992 Police Interview at 2-32. She
18 said she had not told Sanders that she was a witness to the murder
19 because she was afraid she would go to jail and that Ricard or Blue
20 would harm her. Wong Dec., Ex. F, Transcript of
21 § 4900 Hearing at 94-95; Purcell Dec., Ex. 47, Chante Smith's July
22 24, 1992 Police Interview at 40, 62. Blue and Ricard were friends
23 and Smith heard that Blue had paid someone \$10,000 to kill her so
24 that she could not reveal that Ricard shot Shannon. Id. at 40.
25 Because of these threats, Smith left the home she shared with her

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27 ⁵Smith used Ricard's street name, Lavinsta. Apparently, his
28 true name is Lovinsky.

1 mother in San Francisco and moved to Richmond and then to Daly
2 City. Id. at 65. Only Smith's mother knew how to get in touch
3 with her. Id.

4 Sanders made a hand-written note of the Smith interview and
5 put it in the police case file, which was made available to
6 Butterworth. Sanders Dec. at ¶ 9; Wong Dec., Ex. I, Sanders' Note
7 dated 1/3/90. The handwritten note has the word "Chante" written
8 at the top left and the top center has the words "Re: 'Coolie' 187
9 PC,"⁶ and under this is a telephone number. Id. Under this
10 heading appear the words, "Luther Blue, 'Coug Nut' Lakeview
11 'Rapper', 'Louie Lou,' Record Title: 'Scandelous [sic]', Laventa or
12 Vista, Troy Barnes drives a Black Skylark, Mad Hatter, Mark
13 Anthony, Shardedee, 'The Ill Mannered Posse,' and 'We're going over
14 to Sunnydale and start some shit.'" Id.

15 After Smith's initial contact with Sanders, Sanders came to
16 Smith's house, they sat in the parking lot and Smith told Sanders
17 about her knowledge of the people and the cars involved in
18 Shannon's murder. Purcell Dec., Ex. 47, Smith's July 24, 1992
19 Police Interview at 61. Sanders sent three officers from the GTF
20 to Smith's house to show her pictures of a truck similar to the one
21 she had described to Sanders. Id. She was asked to identify the
22 truck because she had told Sanders that, after Shannon had been
23 shot, she had seen people involved in the shooting at the Sundial,
24 a park in Hunter's Point, and she had seen a truck there. Id. at
25

26 ⁶Coolie was Shannon's street name. 187 PC refers to
27 California Penal Code § 187 which provides the definition of
murder.

1 62-63.

2 On February 8, 1990, after Smith had spoken to Sanders,
3 Hendrix and Lewis interviewed Lovinsky Ricard. Purcell Dec., Ex.
4 37, Transcript of February 8, 1990 Police Interview with Lovinsky
5 Ricard. Hendrix named the people mentioned by Smith and asked
6 Ricard if he knew any of them. Ricard denied knowing any of them.
7 Id. at 7-12. Hendrix asked Ricard if he was present when Shannon
8 was shot. Id. at 14. Ricard replied, "No." Id. Hendrix told
9 Ricard that someone had told the police that Ricard had shot
10 Shannon to avenge the death of Cheap Charlie and asked Ricard if he
11 shot Shannon. Id. at 16-17. Ricard again denied shooting Shannon.
12 Id. at 17. Toward the end of the interview Hendrix told Ricard,
13 "I'm saying your name came up in this investigation, with Cooley.
14 Someone says you were there at the scene. Now, I don't think this
15 person would have a grudge with you. I don't think this person
16 would do it maliciously or try to damage you in any way because it
17 doesn't appear to be that type of individual. However, it's
18 something that has to be explained, one way or another. And we'd
19 be less than diligent, sworn to do our duty if we didn't pursue,
20 check it out." Id. at 22-23.

21 On February 9, 1990, Sanders and Gittens interviewed Luther
22 Blue. Wong Dec., Ex. S, Transcript of February 9, 1990 police
23 interview with Luther Blue. Sanders informed Blue that his name
24 had come up in connection with the Shannon homicide. Id. at 4.
25 Blue said that he had never heard anything about the Shannon
26 incident. Id. at 5. Later in the interview, Blue stated that he
27 had heard that Shannon had been shot, but that he was not there.

1 Id. at 10. Sanders stated,

2 Now we're gonna get to the bottom of Roderick Shannon
3 being shot. Now, we know and its [sic] obvious to you,
4 or it should be, that somebody has talked to us . . . I
5 believe you were there, 'cause I believe the person who
6 told me. . . . But what I'm saying son the people we
7 talked to told us exactly what happened. They told us
8 about the truck. We know who the truck belongs to. We
9 know about the truck. We know about the chase, we know
10 that he was -- the person just out drove him, Roderick,
11 he didn't know much about drivin' cars. After he wrecked
12 the car they chased him and when they made that turn, he
13 thought behind that market . . . there used to be a lower
14 fence . . . he thought if he could get over the fence he
15 could get in the backyard and get away. Only when he got
16 up there they caught him. There were people standing
17 around. So, can you tell me . . . why these individuals
18 would say 'yeah, Luther was there,' they didn't say you
19 were doing nothing . . .

20 Id. at 21, 23-24.

21 Blue replied, "I don't know why they'd say I was there." Id.
22 at 24. Sanders stated, "I believe the people who talked to me. I
23 believe you were there. You were there . . . and I can understand
24 you being afraid, that's no . . . Son, that is no crime to be
25 afraid. . . ." Id. at 25. Later, Sanders stated,

26 Now tell me, if I were to tell you that on the night of
27 the incident you were at the 7-11 on Third Street . . .
28 You became possessed up with a group of other young men and
gave chase to an automobile driven by -- actually you
didn't know who it was driven by, they thought it was
Patrick's car. Roderick Shannon was Patrick's cousin.
Gave chase to the car. The car, lost it, picked it up
again, chased it until it ran the fence and then the
truck backed down the street -- that was some pretty
skillful driving. And when the witnesses told us about
that -- that took some pretty skillful driving. All the
time, the people that were in the truck, and in the other
vehicles, they all knew each other. Everybody knew
everybody else -- And you were there. You were there
Luther. Tell you what I'm going to do, son . . . I'm
going to give you time to think about it. . . . Meanwhile
we are going to continue our investigation.

29 Id. at 27.

1 Butterworth testified that Sanders' January 3, 1990 note was
2 in his file, but that he would not have known from the names listed
3 on the note what role these individuals played or why they were
4 identified. Wong Dec. Ex. O, Butterworth Dep. at 113, 116.
5 Butterworth said that this list of names, without any other
6 information, would be valueless because, in a homicide
7 investigation, everything is contextual. Id. at 117. Butterworth
8 learned the significance of the document in the review of the
9 petition for writ of habeas corpus. Id. Butterworth has no
10 personal knowledge whether Sanders' note was produced to Adachi,
11 but he testified that it was in the district attorney's file, and
12 therefore it would have been turned over to Adachi in the initial
13 discovery package. Id. at 113.

14 Adachi declares that he never received any information or
15 documentation regarding the information Smith provided to Sanders.
16 Adachi Dec. at ¶ 4. Adachi states that he never received a copy of
17 Sanders' handwritten note. Id. He states that the first time he
18 received the note was in June, 2002, when Tennison's present
19 attorney gave him a copy of it. Id. at ¶ 5. Adachi states that
20 had he known that Smith had stated that the car chase started at
21 the Seven-Eleven, which was inconsistent with Masina and Pauline's
22 story, he would have had a legitimate alternative theory for the
23 case that would have proven the girls were lying, he could have
24 identified a woman named "Chante" who had information about a list
25 of potential witnesses or suspects and he would have been able to
26 follow up on the dead-end police interviews of Lovinsky Ricard on
27 February 8, 1990, and of Luther Blue on February 14, 1990. Id.

1 Melton declares that he never received any information, oral
2 or written, about the police interview with Smith in which she
3 named Ricard. Melton Dec. at ¶ 4.

4 In Smith's 1992 police interview, Butterworth and Sanders
5 questioned her about her interaction with Plaintiffs. Smith stated
6 that she had gone out with Goff about twice, that they were friends
7 but that they were not dating. Purcell Dec., Ex. 47, 1992 Smith
8 Interview at 39, 60. Smith only knew Goff as Antoine or Sodapop,
9 his street name; she did not know his last name. Id. at 42.
10 Before Plaintiffs' trial, Smith was contacted by some of Tennison's
11 and Goff's friends who told her that Tennison and Goff,
12 independently, wanted her to testify or talk to their attorneys.
13 Id. at 41, 66-67. Smith told Plaintiffs' friends that she had been
14 threatened and couldn't take the risk. Id. at 41. Smith stated
15 that she had worked as an operator for Pacific Bell in Burlingame
16 and, after Plaintiffs' trial, when they were incarcerated in the
17 county jail, she handled several collect calls placed separately by
18 Tennison and Goff. Id. at 66. At that time, Smith did not know
19 Tennison's name. Id. at 42. When Tennison realized that the
20 operator was Smith, he asked her to talk to himself or his
21 attorney, but Smith said she would not come forward because she was
22 afraid of getting into trouble. Id. at 42, 44. Neither Tennison
23 nor Goff had Smith's home number, so they did not know how to find
24 her. Id. at 45.

25 At Tennison's motion for new trial, Bruce Tennison testified
26 that Adachi had asked him to find a woman by the name of Chauntey
27 White to ask her if she knew anything about the Shannon homicide.

1 Wong Dec., Ex. E, Transcript of New Trial Motion at 228. Bruce
2 Tennison could not find her because he did not have a number for
3 her. Id.

4 In her 1992 interview, Smith stated that if Plaintiffs'
5 attorneys had served her with a subpoena, she would have come in
6 and talked to them. Purcell Dec., Ex. 47, 1992 Smith Interview at
7 45. She reiterated this statements in her testimony at the § 4900
8 hearing. Wong Dec., Ex. F., Transcript of § 4900 Hearing at 163,
9 165, 167.

10 At the § 4900 hearing, Goff testified that, before Shannon's
11 murder, Goff had gone out with Smith twice. Wong Dec., Ex. F,
12 Transcript of § 4900 Hearing at 640. Goff testified that a month
13 or two after the murder, he was among a crowd of people who were
14 listening to a person named Lovinsky Ricard brag about shooting
15 Shannon. Id. at 580. Goff heard Ricard mention Smith's name in
16 connection with Shannon's murder, and the next time Goff saw Smith,
17 he asked her if she knew anything about the murder. Id. at 582-83,
18 641. Smith told Goff that she didn't have anything to do with the
19 murder, and Goff never said anything else about it to her. Id. at
20 582. Goff believed he told Melton about Smith. Id. at 595, 677.
21 Goff did not tell Tennison any of the information he knew about
22 Ricard and Smith. Id. at 639. After he was convicted, but prior
23 to being sentenced, Goff had two or three telephone conversations
24 with Smith and he asked her to talk to his lawyer because his
25 friend had told him that she may have been at the murder scene.
26 Id. at 673-74.

1 III. Post-Trial Events -- Lovinsky Ricard

2 On November 7, 1990, shortly after Plaintiffs had been
3 convicted, Lovinsky Ricard was arrested, on a bench warrant, by
4 SFPD officers Lewis and Gittens, two members of the GTF who were
5 working on the Shannon murder with Hendrix and Sanders. Purcell
6 Dec., Ex. 19, Lewis Depo. at 18, 31; Purcell Dec., Ex. 38, Lovinsky
7 Ricard's November 7, 1990 Police Interview at 2. Ricard
8 voluntarily told them that he had shot Shannon. Id. at 34. Lewis
9 and Gittens read Ricard his Miranda warnings and questioned him
10 about the Shannon homicide. Id. at 14. The interview was audio-
11 taped. Ricard stated that, on the night of the murder, he had been
12 hanging out, drinking with others and riding with friends in a
13 convertible. Id. at 15.⁷ Ricard did not want to name the others
14 who were present, stating that he did not want them to be arrested
15 or involved in the case. Id. at 17-18. Ricard said that he had
16 started thinking about his friend Cheap Charlie, who had just been
17 killed, and he was talking about what he would do about it. Id. at
18 3. He had a shotgun with him. Id. He went with his friends in
19 the convertible to a Seven-Eleven store and there he decided to
20 join other people in the back of a pick-up truck. Id. at 6. He
21 saw a black car and he recognized the driver as one of the group
22 who he thought had killed Cheap Charlie. Id. A car chase began
23 and, from the back of the truck, Ricard shot at the black car. Id.
24 The driver threw the car in reverse and went backward. Id. Then

25
26 ⁷At her July 24, 1992 police interview, Smith stated that, on
27 the night of the Shannon murder, she had been driving a convertible
28 with Ricard and two other passengers. Purcell Dec., Ex. 47, Smith
Police Interview at 3-4, 68.

1 the driver of the truck threw the truck in reverse and drove
2 backward chasing the car. Id. During the chase, Ricard was
3 shooting at the car. Id. at 6-7. The driver ran the car up on the
4 curb and into the fence, and jumped out of the car and started
5 running. Id. at 7. Some of the people who had been chasing the
6 black car caught the driver and were beating him in a corner. Id.
7 Ricard jumped out of the back of the truck with the gun and, when
8 he pointed the gun at Shannon, everybody cleared back and Ricard
9 shot him. Id. Then everybody scattered. Id. Ricard jumped back
10 in the truck and the truck and all the cars drove away. Id. at 7-
11 8. The gun he used had been stolen, so there was no possibility
12 that the police would find it. Id. at 8. Ricard stated that he
13 was confessing because he had been feeling bad that two of his
14 friends were going down for something he did and now he was trying
15 to do the right thing. Id. at 13-14, 15. Ricard stated that he
16 knew Tennison and Goff well and they were not at the scene of the
17 murder. Id. at 15. Ricard said the convertible he was originally
18 riding in that evening, before he got into the pick-up truck,
19 pulled up to the scene after the shooting was over. Id. at 18.
20 Several times Lewis asked Ricard for the names of people who could
21 verify any part of his story; Ricard refused to name other people
22 because he didn't want to bring them into it. Id. at 25-28.

23 At his 2001 deposition, Lewis testified that Ricard's
24 description of the car chase was consistent with everything else he
25 had heard about it, that during the course of the chase, the person
26 being chased had put his car in reverse and gone backwards for some
27 distance. Purcell Dec., Ex. 19, December 3, 2001 Lewis Depo. at

1 65. After Ricard confessed, Lewis believed that Ricard murdered
2 Shannon. Id. at 82. Lewis testified that he advised Hendrix and
3 Sanders that Ricard had confessed on tape and "they said they would
4 consider the information that I gave them through the interview and
5 it would be determined from there, from others other than myself,
6 how they would go further." Id. at 86. Lewis stated that he gave
7 the Inspectors a copy or the original of the audiotape, but not a
8 written transcript, so they would have to play and listen to the
9 tape to determine what was on it. Id. Lewis was sure he gave them
10 some kind of narrative regarding the content of the tape. Id. at
11 88.

12 At his 2005 deposition, Lewis testified that on November 7,
13 1990, after he interviewed Ricard, he made a copy of the audiotape
14 of the interview. Wong Dec., Ex. R, May 10, 2005 Lewis Depo. at
15 66. Lewis was asked, "Once you concluded the Ricard interview and
16 you had the audiotape of it, what did you do with that tape?" He
17 answered:

18 My recall is that I made a copy of it and either put it
19 in room 400, which is like the operation center for the
20 police department, so when the different bureau chiefs or
21 lieutenants come in they can forward that information to
22 whomever in their unit needed it. Or I would write a
23 note -- and I recall having done this on occasion -- I
24 don't remember that I did it on this occasion -- and
25 either put it under the door so that they could get it
26 first thing in the morning. Because we work
27 predominantly nights.

28 Id.

Then the following exchange took place:

Q: When you say "put it under the door," do you mean the
door to Inspectors Hendrix' and Sanders' office?

A: The door to the homicide detail, yes.

1 Q: And that was where Inspector Hendrix and Sanders had
2 their desks, in the homicide detail?

3 A: Yes.

4 Q: And is your recollection that you did this immediately
5 after taking the confession?

6 A: That evening before I left the building, yes.

7 . . .

8 Q: Do you recall talking to Inspector Hendrix or
9 Inspector Sanders about what Ricard had said during the
10 November, 1990 interview?

11 A: The next day I believe I talked to them.

12 Q: What did you say?

13 A: "Did you hear the tape?"

14 Q: And were you talking to both Inspector Hendrix and
15 Inspector Sanders or just one of them?

16 A: I don't recall, but I think it was Napoleon.

17 Q: And when you asked him "Did you hear the tape" what
18 did he say?

19 A: As I recall, he said, "Yeah, I listened to it, but it
20 was -- you know, your boy has got to come in and lay it
21 all out. He has got to do better than -- than this."

22 Q: So, he gave you the impression he had listened to the
23 tape?

24 A: Yes, as I recall I believe so.

25 . . .

26 A: Or maybe I told him about the content of the tape. I
27 don't know that he sat and listened to the whole thing.
28 Maybe I came away with that impression. But I was
excited about it. I told him why. And he said, you know
--

Q: He made specific suggestions about additional
information that he would like to see Ricard provide?

A: And he said that while it was a good interview, he was
still very vague on specifics. And so he -- as I recall,
he told me that if he was going to do this then

1 -- then he would be -- he would need a gun, named
2 additional suspects, vehicles, or something tangible to
turn this thing around.

3 Id. at 66-68.

4 At his 2001 deposition, Sanders testified that he received the
5 tape of the Ricard confession within a day or two after it was
6 made. Purcell Dec., Ex. 40, Sanders Depo. at 126. Sanders stated
7 that "the first thing I did -- we did -- was compare the two tapes.
8 And they were diabolically [sic] opposed. One, he had nothing to
9 do with it, and on this one he's -- in this interview, he's
10 confessing. Further, in analyzing his statements in the November
11 7th statement, . . . there were just all kinds of unverifiable,
12 flawed facts in his case. So with this, we wanted to talk to him
13 again. And was -- and to talk to Mr. Lovinsky again. But he was
14 then covered by an attorney, and he didn't want to talk anymore."

15 Id. In answer to the question whether he withheld the copy of the
16 tape from Butterworth, Sanders replied, "No, this was something
17 that was paramount. We got ahold [sic] of him right away and we
18 had to talk to him about it, told him we were investigating it."

19 Id.

20 In his June 2, 2005 declaration submitted in support of his
21 motion for summary judgment, Sanders states that he learned of
22 Ricard's taped confession from Butterworth in May, 1991. Sanders
23 Dec. at ¶ 10. At the time, Butterworth was involved in litigating
24 Tennison's motion for new trial and asked Sanders to investigate
25 the statements made by Ricard on the tape. Id. at 10. Sanders
26 states that he never received a copy of the tape from Lewis and
27 never had a copy in his possession. Id.

At his January 18, 2005 deposition, Hendrix testified that he learned of the Ricard confession from Sanders, but could not remember when Sanders told him about it. Purcell Dec., Ex. 1, Hendrix Depo. at 57, 63. Hendrix testified that he never listened to the audiotape of the confession. Id. at 63. Hendrix testified that he and Sanders were responsible for turning over evidence connected to the Shannon homicide to the district attorney because it was their case. Id. at 64. He testified that he never took any steps to turn the tape of Ricard's confession over to Butterworth, because it was never in his possession. Id. He stated that he felt it was Lewis and Gittens' responsibility to turn the tape over to Butterworth because they took the confession and made the tape. Id. at 67. Hendrix felt angry at Lewis and Gittens for not calling Sanders and himself to conduct the Ricard interview, because the Shannon case was Sanders' and Hendrix' responsibility, and if there was a development in it, he and Sanders should have been contacted. Id. at 67, 70-71. After he learned of the taped confession, Hendrix didn't care about the tape, he just wanted to find Ricard and he and Sanders took steps to try to locate him. Id. at 67, 70, 72. They located Ricard's father and a girl who was keeping company with Ricard and went to the places where Ricard usually hung out, on the street corners and up in the projects. Id. Ricard's father told them that Ricard had left town and there was no sense in them looking for him. Id. at 72-73. Hendrix testified that he and Sanders tried to locate Ricard over a period of months. Id. at 73. During this time Hendrix never informed Butterworth of their efforts to locate Ricard. Id.

1 In his June 2, 2005 declaration submitted in support of his
2 motion for summary judgment, Hendrix states that he first became
3 aware of Ricard's taped confession from Sanders who said that he
4 had learned of it from Butterworth. Hendrix Dec. at ¶ 10. Hendrix
5 states that he never had a copy of the Ricard taped statement in
6 his possession. Id.

7 Butterworth testifies that he first learned of Ricard's
8 confession in May, 1991 when he ran into Lewis in the cafeteria in
9 the Hall of Justice. Butterworth Dec. at ¶ 23. At that time,
10 Butterworth was in the midst of the hearing on Tennison's motion
11 for a new trial. Id. Lewis informed Butterworth that he had a
12 tape-recorded interview with Ricard admitting that he killed
13 Shannon. Id. Butterworth told Lewis that he did not have a copy
14 of the audiotape and asked Lewis to give him a copy, which Lewis
15 did. Id. Butterworth contacted Sanders and informed him of the
16 taped Ricard confession. Id. Sanders responded that he was not
17 aware of any statement in which Ricard admitted killing Shannon.
18 Id. Butterworth immediately informed Tennison's defense counsel of
19 the taped statement, and he included it in his new trial motion.
20 Id. Butterworth asked Sanders to assist him in responding to the
21 new trial motion; Hendrix was not available to work on it. Id.
22 Sanders did some follow-up work to check out some of the statements
23 Ricard had made on the tape, such as visiting a store mentioned by
24 Ricard to see what type of shotgun ammunition the store sold. Id.
25 After he reviewed Ricard's statement with Sanders, Butterworth
26 concluded that Ricard's confession was not credible. Id.
27 Butterworth helped Sanders prepare a declaration regarding Ricard's
28

1 confession, which he submitted to the court. Id.

2 Very soon after the jury verdict against Tennison, Tennison
3 heard from friends that Ricard might be implicated in the Shannon
4 murder. Wong Dec., Ex. E., Transcript of New Trial Motion at 132.
5 Tennison gave this information to Adachi. Id. at 142-43. Adachi,
6 eventually found Ricard and convinced him to make a videotaped
7 confession, which he did anonymously with a hood over his head.
8 Purcell Dec., Ex. 41, Adachi Dec. at ¶ 4. Because the Public
9 Defender's Office was representing Ricard in a separate matter,
10 Adachi's supervisors informed him that he was required to withdraw
11 from representing Tennison, with the new trial motion pending. Id.
12 While he was representing Tennison, no one from the district
13 attorney's office or the SFPD informed him of Ricard's November 7,
14 1990 taped confession to police. Id. at 6. On March 1, 1991,
15 Adachi was replaced as Tennison's counsel by LeRue Grim. On May
16 17, 1991, the second-to-last day of the hearing on Tennison's new
17 trial motion, Butterworth informed Grim of the Ricard tape.
18 Melton, Goff's attorney, was not informed by anyone from the
19 district attorney's office or the SFPD of the November 7, 1990
20 Ricard taped confession. Melton Dec. at ¶ 6.

21 Tennison's motion for a new trial was based, in part, on the
22 tape of Ricard's anonymous confession that Adachi had made. Wong
23 Dec., Ex. GG, October 8, 1990 California court of appeal decision
24 in People v. Tennison, appeal no. A054353 at 5. At the hearing on
25 the motion, Adachi, based on his attorney-client obligations to
26 Ricard, refused to disclose the identity of the videotaped
27 interviewee, but testified that he made the tape in conjunction
28

1 with Tennison's case and he provided the tape to Tennison's new
2 counsel. Wong Dec., Ex. E, Transcript of New Trial Motion at 16
3 passim, 91-94, 102-03. In order to authenticate the video-tape of
4 the anonymous confession, Tennison and Adachi testified about how
5 they found out that Ricard was involved in the Shannon murder. Id.
6 at 47-48, 133 passim. Grim, Tennison's attorney at the new trial
7 proceeding, explained that the testimony was not offered for the
8 truth of the matter, but to show a cumulative, causal chain that
9 led to Tennison's discussion with Adachi regarding Ricard. Id. at
10 132. Tennison stated that in the beginning of October, 1990, about
11 a week after he was convicted, his friends, who thought he would be
12 acquitted because they knew that he was not involved, told him that
13 two people, Lavista Ricard and Luther Blue, were involved in the
14 murder. Id. Tennison called Ricard from the county jail. Id. at
15 133. Ricard told Tennison that he had been among the people who
16 had chased Shannon and that he had fired a shot at him. Id. at
17 136. Tennison asked Ricard to come forward and admit to being the
18 shooter and Ricard agreed to speak to Tennison's lawyer. Id. at
19 138. About a week later, Tennison told Adachi about his
20 conversation with Ricard. Id. at 140. In November, 1990, Adachi
21 told Tennison that he'd called Ricard several times, but hadn't
22 received an answer. Id. at 141-42. Tennison also asked his
23 brother, Bruce Tennison, to speak to Adachi about tracking down
24 Ricard. Id. at 142. Tennison met with Adachi later in November,
25 1990, and Adachi told him he had talked to Ricard over the phone
26 and Ricard had admitted to the crime. Id. at 142-43. Adachi set
27 up a meeting with Ricard, but Ricard failed to show up. Id. at
28

1 143-44. In about December, 1990, Tennison met Luther Blue, who was
2 also in jail. Id. at 144. Blue told Tennison that he had
3 witnessed the Shannon homicide and that he was willing to testify
4 to help Tennison, but when Adachi questioned Blue, he denied
5 knowing anything about the shooting. Id. at 145-46. Tennison
6 stated that Blue told him that homicide inspectors had interviewed
7 Ricard who made a taped statement admitting that he shot Shannon.
8 Id. at 170. Blue also mentioned that a person named Chauntey White
9 was connected with the murder. Id. Tennison testified that in
10 November or December, 1990, his brother, Bruce Tennison, told him
11 that he had talked to Ricard and Ricard told Bruce that Ricard had
12 made a statement to the police admitting to the crime. Id. at 205.
13 Adachi testified that Tennison had given him Ricard's name, address
14 and telephone number very soon after the verdict or even during the
15 trial. Id. at 75.

16 The trial court denied Tennison's motion on the grounds that
17 the tapes of the two Ricard confessions were legally inadmissible
18 and, even if they were admissible, Ricard's statements contained so
19 many inconsistencies that they could not be considered to be
20 trustworthy. People v. Tennison, appeal no. A05453 at 6. The
21 appellate court affirmed. Regarding the admissibility of Ricard's
22 confessions, the court stated that Tennison had "made no showing
23 that he had diligently attempted to obtain Ricard's attendance at
24 the hearing on the motion for new trial, or that he would be
25 legally unavailable to testify at a new trial, a prerequisite for
26 application of the declaration against interest exception [to the
27 hearsay rule]." Id. at 7. Regarding the trustworthiness of the
28

1 confession, the court stated,

2 Ricard's refusal to provide the police or Adachi any
3 names and his inability to account for the whereabouts of
4 the gun undermine his credibility because his version of
5 the incident cannot be corroborated. Likewise the
6 inconsistencies between his two statements, between his
7 statements and the evidence at trial, and between his
8 statements and appellant's testimony cast doubt on their
9 trustworthiness. For instance, Ricard stated that he
10 fired once, but the medical evidence established two
11 shots to the victim's body and witnesses referred to
12 multiple gunshots. . . . Ricard stated that he came
13 forward because 'two of my friends' were going down for
14 the crime, but appellant testified he did not know
15 Ricard, had never seen him, and had only first spoken
16 with him on the telephone after the verdict. Given such
17 inconsistencies, the court did not err in determining
18 Ricard's statements were untrustworthy and thus
19 inadmissible.

20 Id. 7-8.

21 At the § 4900 hearing, Goff testified that, about three to
22 four weeks after Shannon was shot, he heard rumors on the street
23 that Ricard may have had something to do with the murder. Wong
24 Dec., Ex. F, Transcript of § 4900 Hearing at 579. Goff had also
25 heard rumors that the chase started at a Seven-Eleven store. Id.
26 at 578. Goff testified that a month or two after the murder, he
27 had been among a crowd of people who were listening to Ricard brag
28 about shooting Shannon. Id. at 580. Goff assumed that Ricard was
lying because he didn't think the real shooter would brag about it
on the street. Id. at 582. Goff knew Ricard because they lived in
the same neighborhood, but they weren't friends. Id. at 636.
About a month after he was charged with committing the Shannon
murder, Goff told Melton that he had heard Ricard brag about
shooting Shannon and Melton replied that he would look into it.
Id. at 595.

1 IV. Plaintiffs' Claims

2 In their complaints, Tennison and Goff allege that Butterworth
3 participated in the suppression of material, exculpatory evidence,
4 and manufactured evidence by pressuring Pauline to retract her
5 recantation. Tennison and Goff allege the following claims against
6 the Inspectors: (1) they participated in the suppression of
7 material, exculpatory and impeachment evidence that probably would
8 have led to Tennison's and Goff's acquittal; and (2) they actively
9 solicited perjured testimony while deliberately ignoring and
10 failing to investigate exculpatory evidence.

11 LEGAL STANDARD

12 I. Summary Judgment

13 Summary judgment is properly granted when no genuine and
14 disputed issues of material fact remain, and when, viewing the
15 evidence most favorably to the non-moving party, the movant is
16 clearly entitled to prevail as a matter of law. Fed. R. Civ. P.
17 56; Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986);
18 Eisenberg v. Ins. Co. of N. Am., 815 F.2d 1285, 1288-89 (9th Cir.
19 1987).

20 The moving party bears the burden of showing that there is no
21 material factual dispute. Therefore, the court must regard as true
22 the opposing party's evidence, if supported by affidavits or other
23 evidentiary material. Celotex, 477 U.S. at 324; Eisenberg, 815
24 F.2d at 1289. The court must draw all reasonable inferences in
25 favor of the party against whom summary judgment is sought.
26 Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574,
27 587 (1986); Intel Corp. v. Hartford Accident & Indem. Co., 952 F.2d

1 1551, 1558 (9th Cir. 1991).

2 Material facts which would preclude entry of summary judgment
3 are those which, under applicable substantive law, may affect the
4 outcome of the case. The substantive law will identify which facts
5 are material. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248
6 (1986).

7 Where the moving party does not bear the burden of proof on an
8 issue at trial, the moving party may discharge its burden of
9 showing that no genuine issue of material fact remains by
10 demonstrating that "there is an absence of evidence to support the
11 nonmoving party's case." Celotex, 477 U.S. at 325. The moving
12 party is not required to produce evidence showing the absence of a
13 material fact on such issues, nor must the moving party support its
14 motion with evidence negating the non-moving party's claim. Id.;
15 see also Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 885 (1990);
16 Bhan v. NME Hosps., Inc., 929 F.2d 1404, 1409 (9th Cir. 1991),
17 cert. denied, 502 U.S. 994 (1991). If the moving party shows an
18 absence of evidence to support the non-moving party's case, the
19 burden then shifts to the opposing party to produce "specific
20 evidence, through affidavits or admissible discovery material, to
21 show that the dispute exists." Bhan, 929 F.2d at 1409. A complete
22 failure of proof concerning an essential element of the non-moving
23 party's case necessarily renders all other facts immaterial.
24 Celotex, 477 U.S. at 323.

25 Where the moving party bears the burden of proof on an issue
26 at trial, it must, in order to discharge its burden of showing that
27 no genuine issue of material fact remains, make a prima facie

1 showing in support of its position on that issue. UA Local 343 v.
2 Nor-Cal Plumbing, Inc., 48 F.3d 1465, 1471 (9th Cir. 1994). That
3 is, the moving party must present evidence that, if uncontroverted
4 at trial, would entitle it to prevail on that issue. Id.; see also
5 Int'l Shortstop, Inc. v. Rally's, Inc., 939 F.2d 1257, 1264-65 (5th
6 Cir. 1991). Once it has done so, the non-moving party must set
7 forth specific facts controverting the moving party's prima facie
8 case. UA Local 343, 48 F.3d at 1471. The non-moving party's
9 "burden of contradicting [the moving party's] evidence is not
10 negligible." Id. This standard does not change merely because
11 resolution of the relevant issue is "highly fact specific." Id.

12 II. Constitutional Claims Under 42 U.S.C. § 1983

13 Title 42 U.S.C. § 1983 "provides a cause of action for the
14 'deprivation of any rights, privileges, or immunities secured by
15 the Constitution and laws' of the United States." Wilder v.
16 Virginia Hosp. Ass'n, 496 U.S. 498, 508 (1990) (quoting 42 U.S.C.
17 § 1983). Section 1983 is not itself a source of substantive
18 rights, but merely provides a method for vindicating federal rights
19 elsewhere conferred. Graham v. Connor, 490 U.S. 386, 393-94
20 (1989). In order to state a claim under § 1983, Plaintiffs must
21 allege two elements: (1) the violation of a right secured by the
22 Constitution or laws of the United States, and (2) the alleged
23 violation was committed by a person acting under the color of State
24 law. West v. Atkins, 487 U.S. 42, 48 (1988)(citations omitted).

25 An individual defendant is liable for money damages under
26 § 1983 only if the defendant personally participated in or
27 otherwise proximately caused the unconstitutional deprivations of

1 which the plaintiff complains. Leer v. Murphy, 844 F.2d 628, 634
2 (9th Cir. 1988). To establish individual liability, a plaintiff
3 must allege one of the following: (1) the defendant personally
4 participated in or ordered the constitutional violation; (2) the
5 defendant, acting in a supervisory capacity, failed to train
6 properly or supervise personnel, resulting in the violation;
7 (3) the defendant was responsible for an official policy or custom
8 which caused the violation; or (4) the defendant knew of the
9 violation and failed to prevent it. Taylor v. List, 880 F.2d 1040,
10 1045 (9th Cir. 1989); Ybarra v. Reno Thunderbird Mobile Home, 723
11 F.2d 675, 680 (9th Cir. 1984).

12 PRELIMINARY PROCEDURAL MATTERS

13 I. Motion To Strike

14 Citing Kennedy v. Allied Mut. Ins. Co., 952 F.2d 262, 266 (9th
15 Cir. 1991), Foster v. Arcata Assocs., 772 F.2d 1453, 1462 (9th Cir.
16 1985) and Radobenko v. Automated Equip. Corp., 520 F.2d 540, 543-33
17 (9th Cir. 1975), Plaintiffs move to strike Hendrix' and Sanders'
18 declaration statements that they did not learn of the November 7,
19 1990 Ricard confession until May, 1991, on the ground that these
20 statements contradict their prior deposition testimony.

21 In Radobenko, the Ninth Circuit held that a party who had been
22 examined at length by deposition could not create an issue of fact
23 on a motion for summary judgment by submitting an affidavit
24 contradicting his own prior testimony because this would greatly
25 diminish the utility of summary judgment as a method for screening
26 sham issues of fact. Kennedy, 952 F.2d at 266 (citing Radobenko,
27 520 F.2d at 543-44)). In Kennedy, the Ninth Circuit clarified that

1 the rule enunciated in Radobenko does not automatically dispose of
2 every case in which a contradictory affidavit is submitted to
3 explain portions of prior deposition testimony and that, before
4 striking a declaration, the district court must make a factual
5 finding that the contradiction was actually a sham. Id. at 266-67.

6 After having considered the Inspectors' July 1, 2006 motion
7 for relief from this order, the Court concludes that none of the
8 Inspectors' statements will be stricken.

9 II. Request To Submit Statement of Facts

10 In their reply brief, the Inspectors request leave to submit a
11 statement of disputed and undisputed facts with citations to
12 evidence, pursuant to Civil Local Rule 56-2(a). They argue that
13 this is necessary because there are many misstatements of facts in
14 Plaintiffs' briefs. A separate statement of facts is unnecessary:
15 the Court looks at the evidence cited by the parties to support
16 their arguments and determines the accuracy of the statements of
17 fact in the briefs. Therefore, the Inspectors' request to submit a
18 separate statement of disputed and undisputed facts is DENIED.

19 III. Evidentiary Objections

20 The Inspectors object to statements in Plaintiffs' briefs as
21 mischaracterizations of the evidence and object to various pieces
22 of evidence. The Court has reviewed these evidentiary objections
23 and has not relied on any inadmissible evidence. The Court will
24 not discuss each objection individually. To the extent that the
25 Court has relied on evidence to which the Inspectors object, such
26 evidence has been found admissible and the objections are
27 overruled.

1 IV. Effect of Habeas Corpus Order

2 Citing Prudential Real Estate Affiliates, Inc. v. PPR Realty,
3 Inc., 204 F.3d 867, 877 (9th Cir. 2000), the Inspectors argue that
4 the Court's August 26, 2003 Habeas Order has no preclusive effect
5 in this action because the Inspectors were not parties to the
6 habeas case and were not in privity with the respondent in the
7 habeas case or the State of California. Plaintiffs do not respond
8 to this argument.

9 The Inspectors are correct that the doctrine of collateral
10 estoppel that precludes the relitigation of issues previously
11 decided requires that the parties in the second action be the same
12 as or in privity with the parties in the prior proceeding. The
13 Inspectors also are correct that they were not in privity with the
14 respondent in the habeas case and that the habeas respondent did
15 not present a good deal of the evidence submitted by the Inspectors
16 or make some of the arguments that the Inspectors make here.

17 Therefore, the Court concludes that the findings and
18 conclusions in the Habeas Order do not have any preclusive effect
19 on the issues in this case. However, in certain instances, the
20 facts and arguments addressed in the Habeas Order are identical to
21 those presented here. In those instances, the Court may reach the
22 same conclusions it did in the Habeas Order.

23 DISCUSSION

24 In their separate motions, Tennison and Goff move for partial
25 summary adjudication on the liability and causation elements of
26 their claims that the Inspectors suppressed three pieces of
27 material, exculpatory evidence: (1) Ricard's taped confession;

(2) Smith's statements corroborating Ricard's confession; and
(3) the Inspectors' request for \$2,500 from the SFPD's SWP to pay a witness in the Shannon murder case. Butterworth moves for summary judgment on the grounds that he is absolutely or qualifiedly immune from liability on all of Plaintiffs' claims. The Inspectors move for summary judgment on all of Plaintiffs' causes of action on the grounds that: (1) there is no evidence that they violated Plaintiffs' rights by suppressing material information; (2) there is no evidence that they fabricated witness testimony; and (3) they are either absolutely or qualifiedly immune from liability for all alleged constitutional violations.

I. Butterworth's Motion for Summary Judgment

Butterworth argues that he is entitled to summary judgment because at all relevant times he was acting in the role of a prosecutor and thus is entitled to absolute immunity. He argues, in the alternative, that he is entitled to qualified immunity on all claims. Tennison's opposition addresses only Butterworth's conduct in questioning Pauline on April 22, 23, and 24, 1990. Goff's opposition addresses only Butterworth's failure to disclose the Ricard confession to him. Therefore, the Court grants Butterworth's motion for summary judgment on all of Plaintiffs' other claims.

A. The Questioning of Pauline

1. Absolute Immunity

"An official seeking absolute immunity bears the burden of showing that such immunity is justified for the function in question." Genzler v. Longanbach, 410 F.3d 630, 636 (9th Cir.

1 2005) (quoting Burns v. Reed, 500 U.S. 478, 486 (1991)). The
2 presumption is that qualified, rather than absolute, immunity is
3 sufficient to protect government employees in the performance of
4 their official duties. Milstein v. Cooley, 257 F.3d 1004, 1008
5 (9th Cir. 2001) (citing Burns, 500 U.S. at 486-87).

6 A prosecutor performing an advocate's role is an officer of
7 the court entitled to absolute immunity. Buckley v. Fitzsimmons,
8 509 U.S. 259, 272-73 (1993). Prosecutors therefore are absolutely
9 immune from liability for their conduct as "advocates" during the
10 initiation of a criminal case and its presentation at trial. Id.;
11 Imbler v. Pachtman, 424 U.S. 409, 430-31 (1976) (prosecutor
12 entitled to absolute immunity from suit alleging that he knowingly
13 used perjured testimony and suppressed material exculpatory
14 evidence at trial); Burns, 500 U.S. at 490-91 & n.6 (prosecutors
15 absolutely immune for their conduct before grand juries and in
16 presenting evidence at probable-cause hearings for a search
17 warrant).

18 Prosecutors are entitled only to qualified, not absolute,
19 immunity when they perform administrative or investigatory, rather
20 than advocacy, functions. Kalina v. Fletcher, 522 U.S. 118, 122-31
21 (1997). Thus, in determining immunity, the court examines the
22 nature of the function performed, not the identity of the actor who
23 performed it. Id. at 127. Absolute immunity requires that the
24 activities at issue be "intimately associated with the judicial
25 phase of the criminal process." Imbler, 424 U.S. at 430.

26 Prosecutors are not acting as advocates, and therefore are not
27 entitled to absolute immunity, before they have probable cause to
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1 have anyone arrested. Buckley, 509 U.S. at 274; Herb Hallman
2 Chevrolet, Inc. v. Nash-Holmes, 169 F.3d 636, 643 (9th Cir. 1999).
3 However, even after probable cause has been established,
4 prosecutors are absolutely immune only for quasi-judicial
5 functions, not investigatory or administrative actions. Broam v.
6 Bogan, 320 F.3d 1023, 1030-31 (9th Cir. 2003); Genzler, 410 F.3d at
7 638.

8 Activities in preparation for trial, such as the interview of
9 witnesses, may be investigatory or advocatory in nature. Genzler,
10 410 F.3d at 638. The timing of the prosecutor's conduct is a
11 relevant, but not determinative, factor. Id. at 639-40.

12 Tennison presents several grounds for his contention that
13 Butterworth was acting as an investigator when questioning Pauline
14 and thus is not entitled to absolute immunity. First, citing
15 Buckley, 509 U.S. at 274, Tennison argues that Butterworth did not
16 have probable cause to believe that Tennison was involved in the
17 Shannon homicide when he questioned Pauline. Tennison bases this
18 on the fact that the November 28, 1989 warrant for Tennison's
19 arrest was predicated upon Hendrix' affidavit in which Hendrix
20 swore that Pauline corroborated Masina's account of the shooting
21 incident. See Balogh Reply Dec., Ex. 57, Arrest Warrant for
22 Tennison and Hendrix Affidavit. Tennison argues that Hendrix'
23 affidavit was false because Pauline's statement to the police was
24 inconsistent with Masina's story.

25 Pursuant to Buckley, 509 U.S. at 274, if at the time
26 Butterworth interviewed Pauline probable cause to arrest Tennison
27 was lacking, Butterworth was acting as an investigator, and not as
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1 an advocate.

2 The Court concludes that on April 22, 1990, there was probable
3 cause to arrest Tennison. As noted by Butterworth, the information
4 in Hendrix' affidavit regarding Pauline's corroboration of Masina's
5 story, which Tennison states was false, was presented to the court
6 in both Tennison's and Goff's probable cause hearings. See Achiron
7 Reply Dec., Ex. D, Tennison Preliminary Hearing; Ex. C, Goff
8 Preliminary Hearing. At Tennison's preliminary hearing only Masina
9 testified, but the court heard testimony that Pauline had recanted
10 and that Masina had spoken to her after she recanted. At Goff's
11 preliminary hearing, Butterworth called only Masina, but Goff
12 called Pauline as a defense witness. Pauline was examined on the
13 discrepancies between her testimony and Masina's, her recantation
14 and her telephone conversation with Masina regarding her
15 recantation. The court, in both cases, found probable cause.

16 Because the accuracy of the information contained in Hendrix'
17 arrest warrant affidavit was tested in court and the court found
18 probable cause, Tennison's argument that Hendrix' affidavit was
19 insufficient to establish probable cause to arrest is unpersuasive.

20 Tennison next argues that, even if there was probable cause
21 for his initial arrest, there was no probable cause after Pauline
22 recanted on April 22, 1990. Tennison cites Butterworth's
23 deposition at p.p. 327-328 to establish that, after Pauline
24 recanted, Butterworth conceded that he needed Pauline to establish
25 probable cause. However, Butterworth did not concede this at his
26 deposition. Butterworth stated that he had to cancel the
27 preliminary hearing scheduled for April 23, 1990 because Pauline's
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1 recantation "raised some question in my mind as to how valuable a
2 witness she was going to be and whether I wanted to rely upon her
3 for a probable cause finding. And if she were to testify at a
4 preliminary hearing and recant, the only way I would have gotten a
5 holding would be to have impeached her with her prior inconsistent
6 statement. And I wasn't comfortable doing that, given the record
7 of the 707 hearing. . . . I know that I wasn't comfortable
8 proceeding in the face of her recantation. And I didn't have any
9 other witnesses who were in a position to make an identification,
10 so it wasn't really a difficult call at that point [to cancel the
11 preliminary hearing]." Wong Dec., Ex. O, Butterworth Depo. at 327-
12 328. Thus, Butterworth did not cancel the preliminary hearing
13 because he believed probable cause was lacking, but because Masina
14 was unavailable as a witness. When Masina was available as a
15 witness, she alone testified at Tennison's rescheduled probable
16 cause hearing. Tennison's argument that probable cause was
17 extinguished by Pauline's recantation is not persuasive.

18 Tennison argues that even if probable cause did exist during
19 Butterworth's questioning of Pauline, Butterworth was acting as an
20 investigator because his purpose in interviewing Pauline was to
21 persuade Pauline to change her story so that it would be consistent
22 with Masina's.

23 As discussed in Gensler, 410 F.3d at 639, timing is an
24 important element in determining whether the prosecutor is engaging
25 in investigatory police activity or acting as a prosecutor. Here,
26 the timing weighs in favor of concluding that Butterworth was
27 acting as a prosecutor rather than an investigator. When Pauline
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1 came to meet with Butterworth on April 22, 1990, the judicial
2 proceedings against Tennison were underway. The section 707
3 hearing regarding Tennison was held in March and April, 1990, with
4 Pauline as a witness. Tennison was arrested on April 5, 1990 and
5 his preliminary hearing was set for April 23, 1990. That
6 Butterworth met with Pauline immediately before Tennison's
7 preliminary hearing indicates that Butterworth was meeting with her
8 in his role as a prosecutor marshaling evidence, not as an
9 investigator looking for clues and evidence to establish probable
10 cause.

11 Tennison argues that after Pauline recanted and Butterworth
12 continued interviewing her, his questioning was investigative in
13 nature and coerced her to change her testimony.

14 Intimidating and coercing a witness to change her testimony
15 are not advocacy and are not entitled to absolute immunity. Moore
16 v. Valder, 65 F.3d 189, 194 (D.C. Cir. 1996) (quoted with approval
17 in Gensler, 410 F.3d at 638). Intimidating a witness to change
18 testimony is "a misuse of investigative techniques legitimately
19 directed at exploring whether witness testimony is truthful and
20 complete and whether the government has acquired all incriminating
21 evidence." Id.

22 Although Pauline testified that Butterworth, as well as
23 Hendrix and Masina, told her what to say at the trial, she
24 explained that Butterworth communicated this to her by not wanting
25 to hear her recantation, by not listening to her. Although she
26 stated that Butterworth yelled at her, she also indicated she
27 interpreted Butterworth's behavior toward her to be like a parent
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1 talking to a child. Pauline's testimony does not provide evidence
2 that Butterworth coerced or intimidated her.

3 Taking the evidence in the light most favorable to Plaintiffs,
4 Plaintiffs have failed to raise a triable issue of material fact
5 that Butterworth was not acting in his capacity as prosecutor at
6 all times during his interaction with Pauline on April 20 through
7 April 22, 1990 and thus is entitled to absolute immunity.
8 Therefore, Butterworth's motion for summary judgment on Tennison's
9 claim regarding Pauline's interviews on April 20 through April 22,
10 1990 is GRANTED. Nonetheless, the Court discusses whether, even if
11 Butterworth was not acting as a prosecutor, but was acting as an
12 investigator, he is entitled to qualified immunity.

13 2. Qualified Immunity

14 The defense of qualified immunity protects "government
15 officials . . . from liability for civil damages insofar as their
16 conduct does not violate clearly established statutory or
17 constitutional rights of which a reasonable person would have
18 known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). The
19 threshold question is whether, if all factual disputes were
20 resolved in favor of the party asserting the injury, the evidence
21 would show the defendant's conduct violated a constitutional right.
22 Saucier v. Katz, 533 U.S. 194, 201 (2001). "If no constitutional
23 right would have been violated were the allegations established,
24 there is no necessity for further inquiries concerning qualified
25 immunity." Id. On the other hand, if a violation could be made
26 out on the allegations, the next step is to ask whether the
27 constitutional right in issue was clearly established. Id. The

1 question here is whether it would be clear to a reasonable officer
2 that his conduct was unlawful in the situation he confronted. Id.
3 If the law did not put the officer on notice that his conduct would
4 be clearly unlawful, summary judgment based on qualified immunity
5 is appropriate. Id.

6 The Ninth Circuit engages in a two-part test to determine if
7 the right was clearly established at the time of the allegedly
8 impermissible conduct. Franklin v. Fox, 312 F.3d 423, 437 (9th
9 Cir. 2002). First, it must be determined if the law that governs
10 the official's conduct was clearly established. Id. It is not
11 necessary that a prior decision rule "the very action in question"
12 unlawful for a right to be clearly established. Anderson v.
13 Creighton, 483 U.S. 635, 640 (1987). Indeed, some wrongs are self-
14 evident and a "right can be clearly established on the basis of
15 'common sense.'" Lee v. Gregory, 363 F.3d 931, 935 (9th Cir.
16 2004). The plaintiff bears the burden of proving that the right
17 was clearly established at the time of the allegedly impermissible
18 conduct. Maraziti v. First Interstate Bank, 953 F.2d 520, 523 (9th
19 Cir. 1992).

20 The next question is whether, under that clearly established
21 law, a reasonable official could have believed his conduct was
22 lawful. Act Up!/Portland v. Bagley, 988 F.2d 868, 871-72 (9th Cir.
23 1993). The defendant bears the burden of establishing that his or
24 her actions were reasonable, Doe v. Petaluma City Sch. Dist., 54
25 F.3d 1447, 1450 (9th Cir. 1995), and the defendant's good faith or
26 subjective belief in the legality of his or her actions is
27 irrelevant. Alford v. Haner, 333 F.3d 972, 978-79 (9th Cir. 2003).

1 Thus, the Court must decide first whether, if the facts
2 Plaintiffs allege are true, Butterworth committed a constitutional
3 violation. If so, the Court must then decide if the law was clearly
4 established at the time of the conduct at issue, and if so, whether
5 Butterworth's conduct was objectively reasonable.

6 Tennison contends that Butterworth's conduct in regard to
7 Pauline violated his constitutional right to be free from criminal
8 charges based on deliberately fabricated false evidence.

9 Individuals have a constitutional due process right to be free
10 from criminal charges based upon deliberately fabricated false
11 evidence. Devereaux v. Abbey, 263 F.3d 1070, 1074-75 (9th Cir.
12 2001) (en banc). To prevail on this claim, a plaintiff, at a
13 minimum, must show that (1) the officer continued his investigation
14 despite the fact he knew or should have known that the suspect was
15 innocent or (2) the officer used investigative techniques that were
16 so coercive and abusive that he knew or should have known that they
17 would yield false information. Id. at 1076; Cunningham v. Perez,
18 345 F.3d 802, 811-12 (9th Cir. 2003) (that officer continued to
19 interview suspected child sex abuse victims after they initially
20 denied abuse not so coercive or abusive that he knew or should have
21 known he would receive false information). There is no
22 constitutional right to have witnesses interviewed in a particular
23 manner or to have the investigation carried on in a particular way.
24 Devereaux, 263 F.3d at 1075. Therefore, suggestive interview
25 tactics alone do not amount to a constitutional violation. Gausvik
26 v. Perez, 345 F.3d 813, 817 (9th Cir. 2003) (officer's continued
27 questioning of alleged sexual abuse victims after victims initially
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1 denied abuse and telling alleged victim she could not leave until
2 she admitted abuse not so coercive and abusive that officer knew or
3 should have known that he would receive false information).

4 In regard to the first Devereaux prong, after Pauline recanted,
5 it was incumbent upon Butterworth to gather information to determine
6 whether Pauline or Masina was being truthful. Furthermore, although
7 Pauline recanted, it does not necessarily follow that, on this
8 basis, Butterworth knew or should have know that Tennison was
9 innocent. As noted above, Butterworth dismissed Tennison's case
10 after Pauline's recantation because Masina, the only other witness,
11 was in Samoa, and thus was not available to testify at Tennison's
12 preliminary hearing, which was scheduled for the next day. Because
13 Pauline never stated that she saw Goff at the crime scene, she was
14 not needed as a witness at Goff's preliminary hearing, and her
15 recantation was not relevant to his case. Plaintiffs have produced
16 no evidence to demonstrate that Butterworth knew or should have
17 known that Tennison was innocent at that point and should not have
18 continued investigating. Thus, the first Devereaux prong does not
19 apply.

20 In regard to the second Devereaux prong, the evidence shows
21 that when Pauline recanted, Butterworth raised his voice and
22 confronted her. However, Pauline testified that Butterworth's
23 frustration with her reminded her of how a parent would reprimand a
24 child and that Butterworth never told her what to say. Furthermore,
25 Butterworth's contact with Pauline was relatively brief. He met
26 with her for approximately half an hour on April 22nd, half an hour
27 on April 23rd and a few minutes on April 24th. Almost the entire

1 interview on April 23rd was recorded and nothing in the interview
2 was coercive. Therefore, assuming the facts Tennison alleges are
3 true, and taking them in the light most favorable to Tennison, the
4 Court finds that Tennison has failed to show that Butterworth
5 violated his constitutional right to be free from being charged on
6 the basis of deliberately fabricated evidence. Therefore,
7 Butterworth is entitled to summary judgment on the basis of
8 qualified as well as absolute immunity on this claim.

9 Even if Tennison had established a constitutional violation,
10 Butterworth would be entitled to qualified immunity. At the time of
11 the events at issue, the law was clearly established. However, a
12 reasonable person could have believed that the actions taken by
13 Butterworth, under the circumstances, were lawful.

14 Thus, summary judgment is GRANTED in Butterworth's favor on
15 Tennison's claim on the basis of qualified as well as absolute
16 immunity.

17 D. Failure to Provide Ricard Confession to Goff

18 Butterworth argues that he is entitled to absolute
19 prosecutorial immunity for his failure to turn Ricard's confession
20 over to Goff after Goff's conviction. Relying on Houston v. Partee,
21 978 F.2d 362, 367 (7th Cir. 1992), Goff argues that Butterworth is
22 not shielded by absolute immunity because he was no longer involved
23 in Goff's prosecution when he learned of the Ricard confession

24 A prosecutor may be absolutely immune for post-conviction
25 conduct, but only if the conduct is an exercise of prosecutorial
26 discretion, and is not purely investigatory or administrative.
27 Broam, 320 F.3d at 1030-31; see Carter v. Burch, 34 F.3d 257 (4th

1 Cir. 1994) (upholding absolute immunity for prosecutor who withheld
2 exculpatory evidence while handling defendant's post-conviction
3 motions and direct appeal).

4 Butterworth argues that, on May 17, 1991, the date he became
5 aware of the Ricard confession, he was opposing Tennison's motion
6 for a new trial and therefore was acting as a prosecutor. This may
7 be true in regard to Tennison's post-conviction proceedings, but it
8 does not establish that Butterworth was acting as a prosecutor in
9 regard to Goff's post-conviction proceedings. The cases against
10 Tennison and Goff were consolidated for trial, but the post-trial
11 proceedings were litigated separately: Goff's post-conviction new
12 trial motion was filed on October 19, 1990; it was denied on October
13 31, 1990; on August 9, 1991, he filed an opening brief in his direct
14 appeal of his conviction. Because no post-conviction proceedings
15 were pending in the trial court in Goff's case at the time
16 Butterworth received the tape of Ricard's confession, Butterworth
17 was not acting as a prosecutor in regard to Goff. Because the
18 Attorney General represents the people of the State on appeal, even
19 though Goff's appeal was pending, Butterworth would not have been
20 involved in it.

21 In Houston, the plaintiffs were convicted of committing the
22 gang-related murder of Ronnie Bell. Houston, 978 F.2d at 363.
23 While the plaintiffs' appeals were pending, certain State and
24 federal prosecutors, including the one who had prosecuted the
25 plaintiffs, learned during an investigation of the gang's activities
26 that the Bell murder had been committed by three other individuals,
27 not by the plaintiffs. Id. at 364. None of the prosecutors

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1 disclosed this information to the plaintiffs or their attorneys,
2 even though they knew it was relevant to the plaintiffs' pending
3 appeals. Id. Four years after the plaintiffs' conviction, the
4 plaintiffs' attorneys found out about the exculpatory evidence on
5 their own and filed post-conviction petitions which were granted.
6 Id. at 363, 365. The plaintiffs sued the prosecutors. The
7 defendant prosecutors had not been involved in the plaintiffs'
8 appeals. Id. at 366. The prosecutors asserted absolute immunity on
9 the plaintiffs' civil § 1983 claims against them on the ground that
10 absolute immunity attached during the plaintiffs' prosecution and
11 continued indefinitely. Id. at 365-66. The court rejected this
12 argument and concluded that, at the time the defendant prosecutors
13 learned about the exculpatory evidence, they were functioning as
14 investigators, not as prosecutors, and thus were not entitled to
15 absolute immunity. Id. at 367.

16 Butterworth argues that Houston is distinguishable because the
17 prosecutors in that case were involved in a new investigation that
18 led to the exculpatory information. Butterworth points out that he
19 was not acting as an investigator, but learned of the exculpatory
20 evidence in his role as prosecutor in Tennison's case.

21 This argument is unavailing because, even if he was not acting
22 as an investigator, neither was he acting as a prosecutor on Goff's
23 case. Accordingly, Butterworth's motion for summary judgment based
24 upon absolute immunity is DENIED. Butterworth does not move for
25 summary judgment based on qualified immunity.

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1 II. Plaintiffs' and Inspectors' Cross Motions for Summary
2 Judgment on § 1983 Claims Based on Brady Violations

3 Plaintiffs argue that they are entitled to summary adjudication
4 that the Inspectors deprived them of due process by violating their
5 Brady rights, and that this caused them damage. The Inspectors
6 argue that they are entitled to summary judgment on the ground that
7 there is no evidence that they violated Plaintiffs' constitutional
8 rights and, if they did, they are absolutely or qualifiedly immune
9 from liability.

10 A. Legal Standard for § 1983 Claims Based on Brady Violation

11 In Brady v. Maryland, 373 U.S. 83, 87 (1963), the Supreme Court
12 held that "the suppression by the prosecution of evidence favorable
13 to an accused upon request violates due process where the evidence
14 is material either to guilt or to punishment, irrespective of the
15 good faith or bad faith of the prosecution." Id. The government
16 has a duty to disclose Brady material even if the defense fails to
17 ask for it. United States v. Agurs, 427 U.S. 97, 107 (1976). The
18 duty under Brady encompasses impeachment evidence as well as
19 exculpatory evidence. United States v. Bagley, 473 U.S. 667, 676
20 (1985). The government's promise of a benefit to a witness must be
21 disclosed under Brady. Giglio v. United States, 405 U.S. 150, 154
22 (1972).

23 In the criminal context, "[t]here are three components of a
24 true Brady violation: [t]he evidence at issue must be favorable to
25 the accused, either because it is exculpatory or because it is
26 impeaching; that evidence must have been suppressed by the State,
27 either willfully or inadvertently; and prejudice must have ensued."

1 Strickler v. Greene, 527 U.S. 263, 281-82 (1999). Evidence is
2 material "if there is a reasonable probability that, had the
3 evidence been disclosed to the defense, the result of the proceeding
4 would have been different." Id. at 682. The evidence need not be
5 sufficient affirmatively to prove the defendant innocent; it need
6 only be favorable and material. Gantt v. Roe, 389 F.3d 908, 912
7 (9th Cir. 2004). Materiality is measured in terms of the collective
8 effect of the suppressed material, not item by item. Kyles v.
9 Whitley, 514 U.S. 419, 436 (1995).

10 If the omitted evidence creates a reasonable doubt that
11 did not otherwise exist, constitutional error has been
12 committed. This means that the omission must be evaluated
13 in the context of the entire record. If there is no
14 reasonable doubt about guilt whether or not the additional
15 evidence is considered, there is no justification for a
16 new trial. On the other hand, if the verdict is already
17 of questionable validity, additional evidence of
18 relatively minor importance might be sufficient to create
19 reasonable doubt.

20 Agurs, 427 U.S. at 112-13.

21 The obligation to disclose under Brady "is the obligation of
22 the government, not just the obligation of the prosecutor." United
23 States v. Blanco, 392 F.3d 382, 393 (9th Cir. 2004). The
24 prosecution has a duty to learn of any exculpatory evidence known to
25 others acting on the government's behalf. Kyles v. Whitley, 514
26 U.S. 419, 437-38 (1995). A prosecutor's duty under Brady
27 necessarily requires the cooperation of other government agents who
28 might possess Brady material. Blanco, 392 F.3d at 388. Exculpatory
evidence cannot be kept out of the hands of the defense just because
the prosecutor does not have it, where an investigating agency does.
Id. at 393-94.

1 In the criminal context, there is no intent requirement to
2 establish a Brady claim; whether non-disclosure was negligent or by
3 design, it is the responsibility of the prosecutor. Brady, 373 U.S.
4 at 87.

5 The parties agree that to establish a civil rights claim based
6 upon a Brady violation, the plaintiff must establish that the
7 defendant intended to violate the plaintiff's constitutional right.
8 However, they disagree on the level of intent that must be
9 established. Citing Cunningham v. City of Wenatchee, 345 F.3d 802,
10 812 (9th Cir. 2003), the Inspectors argue that bad faith must be
11 shown and Plaintiffs argue that intent to violate a constitutional
12 right is all that is required.

13 Cunningham was a civil rights case based, among other things,
14 on the defendants' failure to preserve and gather evidence that
15 might have exonerated the plaintiff in his criminal case. Id. The
16 Inspectors argue that Cunningham addressed a Brady claim, pointing
17 to the court's cursory summary in the beginning of the opinion that
18 the complaint alleged that the defendants concealed exculpatory
19 evidence. See id. at 806. However, in its analysis of this claim,
20 the court described it as the defendants' failure to preserve and
21 gather potentially exculpatory evidence by failing to document
22 interrogations, failing to keep a record of witnesses' statements
23 and failing to gather physical evidence. Id. at 812. The court
24 then analyzed the claim under Arizona v. Youngblood, not Brady. Id.

25 The Supreme Court in Arizona v. Youngblood, 488 U.S. 51 (1988),
26 distinguished the claim before it, that the government lost evidence
27 that could have been exculpatory, from a Brady claim, concluding
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1 that a Youngblood claim, unlike a Brady claim, requires a showing of
2 bad faith. Youngblood, 488 U.S. at 57. The Supreme Court
3 explained:

4 The Due Process Clause of the Fourteenth Amendment, as
5 interpreted in Brady, makes the good or bad faith of the
6 State irrelevant when the State fails to disclose to the
7 defendant material exculpatory evidence. But we think the
8 Due Process Clause requires a different result when we
9 deal with the failure of the State to preserve evidentiary
10 material of which no more can be said than it could have
11 been subjected to tests, the results of which might have
12 exonerated the defendant.

13 Id.

14 Therefore, Cunningham does not support the Inspectors'
15 contention that the Ninth Circuit requires bad faith to establish a
16 § 1983 claim based on a Brady violation.

17 The Inspectors also rely on Daniels v. Williams, 474 U.S. 327
18 (1986), which held that "the Due Process Clause is simply not
19 implicated by a negligent act of an official causing unintended loss
20 of or injury to life, liberty, or property." Id. at 328 (emphasis
21 in original). However, Daniels did not require bad faith for a due
22 process violation, it simply required more than negligence.

23 Circuit courts are divided on the question of whether a
24 plaintiff must show bad faith to establish a civil rights claim
25 based on a Brady violation. Compare McMillian v. Johnson, 88 F.3d
26 1554, 1567 (11th Cir. 1996) (in a § 1983 action, holding that
27 investigators have a duty to disclose under Brady, irrespective of
28 good or bad faith) with Jean v. Collins, 221 F.3d 656, 660 (4th Cir.
2000) (en banc) (in a § 1983 action, affirming, by an equally
divided court, district court dismissal of complaint on ground that
it merely alleged negligent conduct on the part of defendants and

1 that bad faith was required to hold police officers liable for due
2 process violations); and Villasana v. Wilhoit, 368 F.3d 976, 980
3 (8th Cir. 2004) (in a § 1983 action, holding that bad faith required
4 in Brady claims against law enforcement officials other than
5 prosecutor).

6 Because neither the Supreme Court nor the Ninth Circuit has
7 addressed this issue, this Court must decide whether police
8 investigators are civilly liable for Brady violations only if they
9 act in bad faith.

10 Based upon the fact that Brady makes the non-disclosure of
11 exculpatory evidence a violation of the Due Process Clause
12 irrespective of the good or bad faith of the non-disclosing officer,
13 this Court concludes that bad faith is not required to establish a
14 civil Brady violation. Based upon Daniels, 474 U.S. at 331, which
15 held that a due process violation requires only a deliberate
16 decision on the part of a government official to deprive a person of
17 life, liberty or property, the Court concludes that, to prove a §
18 1983 claim based on Brady against the Inspectors, Plaintiffs must
19 establish only that they deliberately withheld exculpatory evidence
20 from Butterworth.

21 B. Suppression of Ricard Confession

22 There is no dispute that the November 7, 1990 Ricard confession
23 was exculpatory. The Inspectors argue that Plaintiffs' Brady claim
24 based on the Ricard confession fails because the Inspectors lacked
25 the requisite intent to deprive Plaintiffs of a constitutional
26 right, because Plaintiffs knew of Ricard's involvement and because
27 the confession was not material in that it was inadmissible.

1 would deliver the tape to Butterworth. Further, the Inspectors
2 investigated the confession, which could be found inconsistent with
3 an intent to conceal it. Finally, there is no evidence that the
4 Inspectors took any affirmative acts to conceal the confession.
5 Sanders' 2005 statements that he did not know about Ricard's
6 confession until Butterworth told him about it and Hendrix'
7 statement that he only learned about the confession from Sanders, if
8 believed, would establish that Lewis did not inform the Inspectors
9 of the confession and thus they could not have disclosed it to
10 Butterworth.

11 2. Plaintiffs' Knowledge of Ricard's Involvement

12 Citing United States v. Dupuy, 760 F.2d 1492, 1502 n.5 (9th
13 Cir. 1985) and United States v. Aichele, 941 F.2d 761, 764 (9th Cir.
14 1991), the Inspectors argue that Plaintiffs' knowledge of Ricard's
15 alleged involvement in the Shannon murder precludes their Brady-
16 based § 1983 claim.

17 "Where defendants had within their knowledge the information by
18 which they could have ascertained the supposed Brady material, there
19 is no suppression by the government." Dupuy, 760 F.2d at 1502 n.5;
20 Aichele, 941 F.2d at 764 (same). If the government provides to the
21 defense the means of obtaining the exculpatory evidence, there is no
22 Brady violation. Dupuy, 760 F.2d at 1502, n.5. A defendant cannot
23 claim a Brady violation if his counsel was "aware of the essential
24 facts enabling him to take advantage of any exculpatory evidence."
25 United States v. Shaffer, 789 F.2d 682, 690 (9th Cir. 1986); see,
26 e.g., United States v. Bracy, 67 F.3d 1421, 1428-29 (9th Cir. 1995)
27 (where government discloses all information necessary for defense to
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1 discover alleged Brady material on its own, government is not guilty
2 of suppressing evidence). "Any allegation of suppression boils down
3 to an assessment of what the State knows at trial in comparison to
4 the knowledge held by the defense." Dupuy, 760 F.2d at 1502, n.5
5 (quoting Giles v. Maryland, 386 U.S. 66, 96 (1967) (White, J.,
6 concurring)).

7 However, the availability of particular information through the
8 defendant himself does not negate the government's duty to disclose.
9 United States v. Howell, 231 F.3d 615, 625 (9th Cir. 2000).

10 "Defendants often mistrust their counsel, and even defendants who
11 cooperate with counsel cannot always remember all of the relevant
12 facts or realize the legal importance of certain occurrences." Id.
13 Therefore, defense counsel is entitled to plan trial strategy on the
14 basis of full disclosure by the government, regardless of the
15 defendant's knowledge or memory of the disclosed information. Id.

16 The Inspectors point to statements made by Tennison at the
17 hearing on his motion for new trial and statements made by Goff at
18 the § 4900 hearing showing that Plaintiffs knew of Ricard's
19 involvement in the murder before the Inspectors did.

20 Tennison's testimony at the hearing on his motion for new trial
21 indicates that, at least five months before the hearing, he had
22 heard of Ricard's involvement with the Shannon murder and shortly
23 thereafter heard that Ricard had made a taped confession to the
24 police. Tennison testified that he told Adachi that he knew Ricard
25 had committed the crime, but it is not clear that he told Adachi
26 that he had heard that Ricard had confessed to the police on tape.
27 Goff's testimony at the § 4900 hearing indicates that he had heard

1 Ricard brag about shooting Shannon and had told Melton this very
2 soon after he had been charged with the murder. There is no
3 evidence that Goff or Melton knew that Ricard had given a taped
4 confession to the police.

5 Thus, the evidence shows that Plaintiffs and their attorneys
6 suspected that Ricard was the shooter, before the trial in Goff's
7 case and before the new trial proceeding in Tennison's case.
8 However, it is not clear whether the attorneys knew of Ricard's
9 taped confession to the police. The evidentiary value of Ricard's
10 taped confession to the police, after being Mirandized, surpasses
11 any evidence that Plaintiffs could have given about their knowledge
12 of Ricard's involvement.

13 Disputed issues of material facts prevent summary adjudication
14 for either side on the issue of whether the extent of Plaintiffs'
15 attorneys' knowledge of Ricard's involvement excused the prosecution
16 from disclosing the tape.

17 3. Admissibility of the Ricard Confession

18 The Inspectors move for summary adjudication that, even if they
19 intentionally failed to inform Butterworth of Ricard's confession,
20 the confession was not material because it was inadmissible hearsay.

21 To support a claim under Brady, the withheld information must
22 be material. Brady, 373 U.S. at 87. To be material, the withheld
23 information, or evidence acquired through it, must be admissible.
24 United States v. Kennedy, 890 F.2d 1056, 1059-60 (9th Cir. 1989).

25 The Inspectors point out that the confession was not admitted
26 at the hearing on Tennison's motion for new trial because the
27 confession was hearsay and Tennison's attorney did not establish

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1 that Ricard was unavailable to testify, as required for the
2 declaration-against-interest exception to the hearsay rule. The
3 Inspectors further argue that, even if Tennison's attorney had been
4 able to show Ricard was unavailable, the court of appeal found that
5 Ricard's confession was not sufficiently trustworthy to have
6 qualified as a declaration against interest.

7 Plaintiffs respond that the trial court and the court of appeal
8 found Ricard's confession to be inadmissible and untrustworthy
9 because the courts did not have a full factual record before them.

10 In favor of Plaintiffs' argument, at the time the trial court
11 and the court of appeal made their decisions that Ricard's
12 confession to the police was inadmissible and unreliable, Smith's
13 corroborating statements were not part of the record. In addition,
14 if the confession had been turned over to Plaintiffs in a timely
15 manner, Adachi's interview of an anonymous person would not have
16 been introduced into evidence to confuse matters. However, as noted
17 by the Inspectors, Ricard's confession suffered from internal
18 inconsistencies and, therefore, the courts might have found it
19 inadmissible even with Smith's statements and without the anonymous
20 confession.

21 The Court finds that disputed issues of material fact preclude
22 a determination of whether the State courts would have found
23 Ricard's confession admissible if all relevant facts had been timely
24 disclosed. Therefore, the cross-motions for summary adjudication of
25 the issue of admissibility of the confession are DENIED.

26 In summary, based upon disputed issues of material facts as
27 discussed above, the cross-motions for summary adjudication of
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1 whether the Inspectors violated Plaintiffs' due process rights under
2 Brady are DENIED.

3 The Inspectors argue that even if they committed a
4 constitutional violation, they are absolutely or qualifiedly immune
5 from liability.

6 4. Absolute Immunity

7 Peace officers and other investigators are protected by
8 absolute immunity when performing prosecutorial or quasi-judicial
9 functions, typically by assisting the prosecutor to prepare the case
10 after probable cause for arrest has been established. KRL v. Moore,
11 384 F.3d 1104, 1113 (9th Cir. 2003). As noted above, the absolute
12 immunity inquiry is focused on the nature of the function performed,
13 not the identity of the actor who performed it. Forrester v. White,
14 484 U.S. 219, 229 (1988).

15 The Inspectors argue that they were not acting in an
16 investigative capacity in November, 1990, when Ricard confessed,
17 because the investigation had long ended, the Inspectors' only role
18 at that time was to assist Butterworth in his duties as a
19 prosecutor, and Plaintiffs had already been convicted. However,
20 these facts do not end the inquiry. As stated in Gensler, 410 F.3d
21 at 639, timing is relevant, but is not dispositive of the
22 classification of the defendant's activity.

23 At his 2001 deposition, Sanders testified that he received the
24 Ricard confession within a day or two after it was made, immediately
25 began investigating it and informed Butterworth of the
26 investigation. At his 2005 deposition and in his 2005 declaration,
27 Sanders testified that he did not learn of the confession until

1 Butterworth told him about it in May, 1991. At his 2005 deposition,
2 Hendrix testified that he learned of the Ricard confession from
3 Sanders, that they immediately took steps to locate Ricard, and that
4 he never informed Butterworth of the confession. In his 2005
5 declaration, Hendrix stated that he did not investigate the Ricard
6 confession. Butterworth testified that he never learned about the
7 Ricard confession from the Inspectors; instead he was informed about
8 it by Lewis, whom he happened to meet accidentally in the cafeteria,
9 months after it had been given.

10 If the Inspectors learned of the Ricard confession soon after
11 it was made in 1990 and then investigated it, they were acting in an
12 investigative capacity. Accordingly, absolute immunity would not
13 shield them from Brady liability for withholding the Ricard
14 confession. The Inspectors' motion for summary judgment on this
15 ground is DENIED.

16 (2) Qualified Immunity

17 (a) Clearly Established Law

18 At the time the Inspectors learned of Ricard's November, 1990
19 confession to the police, the law regarding the constitutional duty
20 of law enforcement officials to turn over exculpatory evidence was
21 clearly established. The seminal Supreme Court cases establishing
22 this duty were decided in 1963 and 1976. See Brady v. Maryland, 373
23 U.S. at 87; Agurs, 427 U.S. at 107.

24 Citing Broam v. Bogan, 320 F.3d 1023, 1032 (9th Cir. 2003), the
25 Inspectors argue that there was no clearly established law that a
26 police officer has a legal duty to investigate and provide post-
27 conviction, second-hand information to the prosecution or the

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1 defense.

2 In Broam, the court stated that once probable cause to arrest
3 has been established, a law enforcement officer has no
4 constitutional duty to investigate independently every claim of
5 innocence, whether the claim is based on mistaken identity or lack
6 of the requisite intent. Id. However, the court did not hold, as
7 the Inspectors argue, that a law enforcement officer has no
8 constitutional duty to turn over to the prosecution material
9 exculpatory evidence in his possession. In fact, Broam indicated
10 the opposite, that "an officer is not entitled to a qualified
11 immunity defense, however, where exculpatory evidence is ignored
12 that would negate a finding of probable cause." Id. The Ninth
13 Circuit has also stated:

14 There is no ambiguity in our law. The obligation under
15 Brady and Giglio is the obligation of the government, not
16 merely the obligation of the prosecutor. . . .
17 'Exculpatory evidence cannot be kept out of the hands of
the defense just because the prosecutor does not have it,
where an investigating agency does.'

18 Blanco, 392 F.3d at 393-94 (internal citations omitted).

19 Relying on Villasana, 368 F.3d at 979 (citing Imbler v.
20 Pachtman, 424 U.S. 409, 427 (1976)), the Inspectors next argue that,
21 because only the prosecutor has a duty to disclose evidence to the
22 defense, Plaintiffs cannot seek § 1983 damages for an alleged Brady
23 violation from non-prosecutors who do not have absolute
24 prosecutorial immunity.

25 The Inspectors mischaracterize the holding of Villasana.
26 Villasana did not hold that investigators cannot be civilly liable
27 for a Brady violation; it addressed the standard that should apply
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1 to such claims. Id. at 980. Courts have held investigators liable
2 for failing to disclose material exculpatory evidence to the
3 prosecutor. See McMillian v. Johnson, 88 F.3d 1554, 1567 (11th Cir.
4 1996) (although investigators have no Brady obligation to turn over
5 exculpatory evidence to the defense, they have a duty, under Brady,
6 to turn over such evidence to the prosecutor); Newsome v. McCabe,
7 256 F.3d 747, 752 (7th Cir. 2001) (under a qualified immunity
8 analysis, concluding that it was clearly established in 1979 and
9 1980 that police could not withhold from prosecutors exculpatory
10 information); Jones v. City of Chicago, 856 F.2d 985, 993 (7th Cir.
11 1988) (in § 1983 case, upholding jury verdict against defendant
12 police officers on ground that jury could have found defendants
13 concealed from prosecutors facts material to decision whether to
14 prosecute plaintiff).

15 Thus, clearly established law would inform a reasonable officer
16 that Ricard's confession should have been turned over to the
17 prosecutor, who in turn would be responsible for providing it to
18 defense counsel.

19 (b) Reasonable Conduct

20 Again relying on Villasana, 368 F.3d at 978, the Inspectors
21 argue that they are entitled to qualified immunity because they
22 reasonably believed that Butterworth was responsible for providing
23 any exculpatory evidence to defense counsel, and they were not. As
24 discussed above, this argument is a mischaracterization of well-
25 established law regarding the duty of law enforcement officials to
26 turn over all exculpatory evidence to the prosecutor; the Inspectors
27 fail to explain how Butterworth could have disclosed Ricard's
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1 confession to Plaintiffs if the Inspectors never told him about it.

2 The Inspectors argue that because they never had possession of
3 the tape of the Ricard confession, they could not have suppressed
4 it. Furthermore, they argue that "a reasonable officer could have
5 believed that Lewis, the SFPD officer who actually took Ricard's
6 confession, would have advised Butterworth of the confession."

7 The Inspectors cannot avoid responsibility for their obligation
8 by assuming that a subordinate fulfilled it. At his deposition,
9 Hendrix testified that he and Sanders were responsible for turning
10 over evidence connected to the Shannon homicide to the district
11 attorney because it was their case and that it was Lewis and
12 Gittens' responsibility to get the tape of the Ricard confession
13 either to the district attorney or to Sanders or himself. Lewis
14 testified that he did get the tape to the Inspectors. He testified
15 that, immediately after he took Ricard's confession, he informed the
16 Inspectors of it by putting a copy of the taped confession in a
17 place where the Inspectors would receive it, and that he spoke to
18 Hendrix about the confession the next day. Sanders testified that
19 he received the tape of Ricard's confession within a day or two of
20 November 7, 1990, the date it was made. Years later, Sanders
21 testified that he did not receive the tape of the confession from
22 Lewis in 1990 but that he learned of it from Butterworth in May,
23 1991.

24 Viewing the evidence in the light most favorable to Plaintiffs,
25 it was the Inspectors' responsibility to inform Butterworth of the
26 confession, and they did not have reason to believe that Lewis or
27 Gittens did so. Therefore, these facts do not demonstrate the

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1 Inspectors acted reasonably under the circumstances.

2 Next, the Inspectors argue that they are protected by qualified
3 immunity because Butterworth learned of the confession and provided
4 it to Plaintiffs' defense attorneys in sufficient time for it to be
5 considered by the trial and appellate courts and the failure to
6 inform Butterworth of the confession earlier did not violate clearly
7 established law of which a reasonable officer would have been aware.

8 Due process requires the disclosure of exculpatory material in
9 sufficient time to permit the defendant to make effective use of the
10 material. LaMere v. Risley, 827 F.2d 622, 625 (9th Cir. 1987). In
11 determining whether the timing of the disclosure satisfied due
12 process, a court considers the prosecution's reasons for late
13 disclosure and whether the defendant had an opportunity to make use
14 of the disclosed material. Id.

15 In its August 26, 2003 Habeas Order, the Court explained why
16 the delay in turning over the Ricard confession was prejudicial to
17 Tennison. Purcell Dec., Ex. 52, August 26, 2003 Order at 100-102.
18 In the habeas proceeding, the respondent had not explained why the
19 Inspectors did not inform Butterworth of the confession. The only
20 explanation the Inspectors make here, that it was Lewis'
21 responsibility, is insufficient when viewing the facts in the light
22 most favorable to Plaintiffs. Although the Court's ruling in the
23 habeas case has no preclusive effect on the issues in this case,
24 because the facts are the same, the Court adopts the reasoning in
25 the August 26, 2003 Habeas Order regarding prejudice to Tennison due
26 to the delay in receiving Ricard's confession. Furthermore, Goff
27 was similarly prejudiced by the delay in his receipt of the

1 confession, because he could have immediately used it as the basis
2 of his State appeals and habeas petitions.⁸ As discussed
3 previously, although the State courts found the confession to be
4 unreliable, they did so without the benefit of all of the withheld
5 Brady material and they compared it to the anonymous Ricard
6 confession obtained by Adachi that would not have been submitted if
7 the taped Ricard confession to the police had been timely turned
8 over to both Plaintiffs.

9 Therefore, the fact that eventually Butterworth learned of the
10 confession from Lewis and then informed Tennison of it does not
11 excuse the Inspectors from their duty to turn the tape over in
12 sufficient time for Plaintiffs to make use of it. These facts fail
13 to demonstrate that the Inspectors acted reasonably under the
14 circumstances.

15 Accordingly, the Court DENIES the cross-motions for summary
16 adjudication of this claim and DENIES the Inspectors' motion for
17 summary judgment of absolute or qualified immunity.

18 B. Suppression of Smith's Statement

19 The Inspectors argue that Plaintiffs' Brady claim based on
20 Smith's information fails because the information is not
21 exculpatory, the Inspectors lacked the requisite intent to deprive
22 Plaintiffs of a constitutional right and Plaintiffs' knowledge of

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24 ⁸As discussed previously in relation to Butterworth's motion
25 for summary judgment, Butterworth did not turn over the Ricard
26 confession to Goff. However, Butterworth's actions are not
27 relevant to whether the Inspectors are protected by qualified
immunity. Therefore, for this discussion, it is assumed that the
Inspectors would have fulfilled their responsibilities if they had
turned the tape over to Butterworth.

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1 Smith's involvement means the Inspectors did not suppress the
2 confession.

3 (1) Exculpatory Information

4 The Inspectors argue that Smith's information is not
5 exculpatory on the ground that, before 1992, Smith did not tell the
6 police that she had witnessed Shannon's murder. They argue that her
7 January 3, 1990 phone call to Sanders was mysterious because she
8 only identified herself as "Chante" and provided only a contact
9 phone number. They point out that they interviewed the five
10 individuals who she had heard were present at the murder and learned
11 nothing about the murder. The Inspectors, pointing to Sanders' note
12 as evidence, also argue that Smith did not say that Tennison and
13 Goff were not at the murder scene.

14 In her 1995 declaration, Smith states that she told Sanders in
15 1990 that he had arrested the wrong people for the Shannon murder
16 because she had heard that Ricard had shot Shannon and that Tennison
17 and Goff were not present at any point during the homicide. Smith
18 Reply Dec. at ¶ 8. The fact that Sanders did not write this
19 information in his note does not prove that Smith did not provide
20 it.

21 Furthermore, the Inspectors' characterization of Smith's call
22 as mysterious is inconsistent with the evidence that the Inspectors
23 knew Smith and her friends before the Shannon murder. For instance,
24 at Smith's 1992 interview, Sanders asked her how long she had known
25 himself and Hendrix, and Smith replied that she had known them for a
26 couple of years, from before the Shannon murder. Purcell Dec., Ex.
27 47, 1992 Smith Interview at 76. Sanders stated, "We know all of

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1 your, a lot of your buddies, and people who hang out with you on the
2 street, is that correct?" Id. Smith replied, "Yes." Id. At his
3 2001 deposition, Sanders testified that he and Hendrix knew Smith,
4 just as they knew many of the young people in her neighborhood, and
5 that they had questioned her about a number of the gang-related
6 murders that had occurred in her neighborhood. Balogh Reply Dec.,
7 Ex. 63, 2001 Sanders Depo. at 143-44.

8 Further, the Inspectors' follow-up interview of Luther Blue
9 after Smith disclosed his name to Sanders indicates that she told
10 Sanders that the car chase started at the Seven-Eleven. This was
11 exculpatory because it cast doubt on Masina's testimony that the car
12 chase started at Lovers' Lane. Finally, if Smith's information had
13 been disclosed, she could have testified at Tennison's motion for
14 new trial, and important parts of Ricard's confession would have
15 been corroborated, which would have been a significant factor in the
16 trial judge's analysis of whether Ricard's confession was
17 trustworthy. It is reasonable to infer that, after Ricard
18 confessed, Smith would have no reason to fear retaliation from
19 Ricard or Blue if she testified that she had been an eyewitness to
20 Shannon's shooting.

21 Therefore, the information Smith relayed to Sanders in 1990 was
22 exculpatory.

23 (2) Intent

24 The Inspectors argue that Sanders' January 3, 1990 note about
25 the Smith interview was in Butterworth's file and this negates any
26 inference that Sanders intended to bury information connected to
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1 Smith.⁹ Also, according to the Inspectors, the fact that they
2 interviewed the five individuals Smith named and put notes of those
3 interviews in the file demonstrates that they had no intention to
4 withhold any of Smith's information. Lastly, to support their claim
5 that Sanders' note was sufficient to fulfill his Brady obligation,
6 the Inspectors point to Adachi's and Melton's testimony that, had
7 they seen Sanders' note, they would have been alerted to Smith and
8 her information.

9 Plaintiffs respond that they never saw Sanders' note and, even
10 if they had, it was insufficient to alert anyone to Smith's identity
11 or the substance of her statements because it omitted Smith's last
12 name, and her statements that Ricard had committed the murder, that
13 Plaintiffs were not at the murder scene, and that the car chase
14 started at the Seven-Eleven store. As evidence that Sanders' note
15 was insufficient under Brady, Plaintiffs cite Butterworth's
16 testimony that he could not ascertain its significance. Plaintiffs
17 also argue that Sanders' intent to suppress Smith's information is
18 demonstrated by the fact that he made no notes of his further
19 contacts with Smith which would have alerted Plaintiffs to the
20 significance of her information, nor are there notes that members of
21 the GTF interviewed Smith regarding her knowledge of the truck that
22 was thought to be involved in the car chase.

23 Because Butterworth testified that Sanders' note was in his
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25 ⁹The Inspectors actually argue that the facts show that
26 Sanders did not act in bad faith. As discussed above, Plaintiffs
27 must show that the Inspectors deliberately intended to withhold
28 Brady material; it is not necessary to show they acted in bad
faith.

1 file and therefore it would have been turned over to Plaintiffs'
2 attorneys, but Plaintiffs' attorneys testified that they did not
3 receive the note, there is a dispute about whether Sanders included
4 the note in the file he gave Butterworth. And, even if Sanders gave
5 the note to Butterworth, it was cryptic and failed to disclose
6 significant details. The fact that Adachi and Melton thought the
7 note was important does not mean the note was sufficient as written.
8 The Inspectors' insistence that they did not know Smith or the
9 people she mentioned is belied by other testimony where the
10 Inspectors admit they knew Smith before the Shannon murder, knew the
11 people with whom she associated and knew that she said that the car
12 chase started at the Seven-Eleven store instead of Lovers' Lane.
13 The Inspectors do not address Plaintiffs' argument that Sanders made
14 no notes of his further contacts with Smith or of the interviews of
15 Smith by members of the GTF. Therefore, Sanders' note did not
16 fulfill his Brady obligations. However, a fact-finder could infer
17 that Sanders thought the note was sufficient. As noted above,
18 questions involving state of mind are generally inappropriate for
19 summary judgment. Therefore, there are disputed issues of material
20 fact regarding intent and the cross-motions for summary adjudication
21 of this issue are DENIED.

22 (3) Plaintiffs' Knowledge of Smith

23 The Inspectors argue that they are not liable for a Brady-based
24 § 1983 violation because Plaintiffs independently knew of Smith and
25 that she might have information about the Shannon murder, and thus
26 Plaintiffs' attorneys could have discovered the alleged Brady
27 material on their own.

28

1 (a) Tennison's Knowledge of Smith

2 Citing Smith's 1992 police interview, the Inspectors claim that
3 Tennison knew Smith because she talked to him before his trial and
4 he asked her to be a witness for him at his trial. The Inspectors
5 argue that Tennison or Adachi could have found Smith and learned of
6 her information before trial. This argument is unpersuasive. At
7 her 1992 interview, Smith stated that she barely knew Tennison and
8 that she only spoke with him coincidentally when she worked as an
9 operator and Tennison placed a telephone call from jail. Although
10 Tennison asked her to speak to his attorney about the Shannon
11 homicide, she declined because she feared that she would be killed
12 by Ricard or Blue if she did so. She explained that, because she
13 feared for her life, she asked her family not to give her telephone
14 number or address to Plaintiffs and that she moved from her former
15 address to ensure that her whereabouts would be secret. Smith's
16 statements are corroborated by the testimony at the hearing on
17 Tennison's motion for new trial. At the time of the hearing, the
18 only information known to Tennison was that a person named Chaunteney
19 White may have witnessed the Shannon murder; even though Tennison's
20 brother searched for her, he was unable to locate her.

21 This evidence establishes that Tennison had some vague
22 information about Smith, that he diligently searched for her, but
23 that the search was unsuccessful. On the basis of this evidence,
24 the Court cannot find that Tennison's attorney had the knowledge and
25 means to obtain Smith's information on his own.

26 (b) Goff's Knowledge of Smith

27 The Inspectors cite Goff's deposition and his testimony at the
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1 § 4900 hearing to show that he had a close romantic relationship
2 with Smith before the Shannon murder, that after the murder he heard
3 she might have been involved and that he told Melton this. The
4 evidence shows that Goff was not romantically involved with Smith;
5 they just knew each other from the neighborhood, they had gone to
6 the movies together once or twice, but Smith did not even know
7 Goff's last name. A few weeks after the murder but before he was
8 arrested, Goff heard Ricard mention Smith's name in connection with
9 the murder. Goff asked Smith about her involvement, but when she
10 denied knowing anything, he did not pursue the subject. Goff had
11 also heard that the car chase started at the Seven-Eleven. After he
12 was arrested, Goff gave his attorney this information. After the
13 trial, Goff coincidentally had a brief conversation with Smith in
14 her role as operator when he was placing a call from jail. Goff
15 asked Smith to talk to his attorney and Smith refused.

16 Unlike Tennison, Goff had heard immediately after he was
17 arrested about Smith's connection to the murder and that the car
18 chase started at the Seven-Eleven and he informed his attorney of
19 this. On the basis of this evidence, the Court finds that there are
20 disputes of material fact regarding whether Goff's attorney had
21 sufficient information to have found Smith and her exculpatory
22 information on his own.

23 In summary, based upon disputed issues of material facts, the
24 cross motions for summary adjudication on liability are DENIED.

25 (4) Absolute Immunity

26 Although the Inspectors make a blanket argument that they are
27 absolutely immune from all of Plaintiffs' claims, they do not

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1 specifically argue that absolute immunity applies to Plaintiffs'
2 Brady claim regarding Smith and the information she provided.
3 Therefore, absolute immunity is DENIED in regard to this claim.

4 (5) Qualified Immunity

5 The Inspectors argue that, even if they committed a
6 constitutional violation, they are qualifiedly immune from
7 liability. As discussed above, the law regarding the duty of police
8 to turn over exculpatory evidence to the prosecutor was clearly
9 established at the time these events occurred. Thus, the Court
10 addresses whether the Inspectors' conduct was reasonable under the
11 clearly established law.

12 As discussed above, the Court has found that the information
13 Smith told the Inspectors was exculpatory and that Sanders'
14 handwritten note of his first interview with Smith was insufficient
15 to fulfill his Brady obligation. For all the reasons stated above,
16 the Inspectors' failure to alert Butterworth to this information so
17 that he, in turn, could have informed Plaintiffs of it, cannot be
18 summarily adjudicated to be objectively reasonable under clearly
19 established law. Therefore, the Inspectors' motion for summary
20 adjudication of qualified immunity is DENIED.

21 C. Request for Money From Secret Witness Program

22 (1) Exculpatory Evidence

23 The Inspectors argue that there is no constitutional violation
24 for failing to disclose the SWP memo to Butterworth because the
25 information is not exculpatory in that no one received any reward
26 money. Plaintiffs argue that the memo is exculpatory because it had
27 impeachment and investigative value. They argue that the

1 exculpatory nature of the memo is reinforced by the April 23, 1990
2 conversation between Hendrix and Masina, which shows that Hendrix
3 discussed a reward with Masina, and by the two entries from the
4 ledger of Contingent Fund B indicating payments to Sanders and
5 Hendrix in the total amount of approximately \$1,400.

6 Although Masina declares that she was not offered a reward and
7 did not receive one, the enhanced tape of the April 23, 1990
8 conversation between Hendrix and Masina is evidence that Hendrix may
9 have discussed a reward with Masina. As acknowledged by Hendrix, a
10 reward taints a witness' testimony at trial. Purcell Dec., Ex. 15,
11 Hendrix Depo. at 124. The audio experts' disagreement about whether
12 the word "reward" is mentioned by Hendrix raises a factual issue for
13 a jury to decide.

14 Also, the Inspectors do not explain the whereabouts of the
15 original audio tape nor how copies of the audio tape came to be in
16 such poor condition.

17 Spoliation of evidence, defined as "the destruction or
18 significant alteration of evidence, or the failure to preserve
19 property for another's use as evidence in pending or reasonably
20 foreseeable litigation," supports an inference that the evidence was
21 unfavorable to the party responsible for its destruction. Byrni v.
22 Town of Cromwell, Bd. of Educ., 243 F.3d 93, 107 (2nd Cir. 2001).
23 An inference of spoliation, in combination with some evidence for
24 the plaintiff, can allow the plaintiff to survive summary judgment.
25 Medical Lab Mgmt. Consultants v. American Broadcasting Cos., Inc.,
26 306 F.3d 806, 825 (9th Cir. 2002).

27 Here, the fact that the audio tape was not disclosed, and the
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1 original was not preserved, for use as evidence in Plaintiffs'
2 criminal case or their future habeas petitions, which were
3 reasonably foreseeable to the Inspectors, raises an inference that
4 the conversation on the audio tape was unfavorable to the Inspectors
5 and the criminal case against Plaintiffs. This, in conjunction with
6 the evidence of the SWP memo, contributes to the inference that, at
7 the very least, a reward was discussed with Masina.¹⁰ Thus, the SWP
8 memo could be found to be exculpatory. The Inspectors' argument
9 that the SWP memo is inadmissible hearsay is unpersuasive; armed
10 with the memo, Plaintiffs' trial counsel could have asked the
11 Inspectors about it at trial and used it to impeach them if they
12 denied making the request from the SWP.

13 The Court concludes that there are disputed issues of fact
14 regarding whether the SWP memo was exculpatory.

15 (2) Intent

16 The Inspectors argue that they did not intend to withhold the
17 SWP memo, as evidenced by the fact that they placed it in the police
18 case file where Butterworth could access it and turn it over to
19 Plaintiffs.

20 Officer Tabak, San Francisco's Rule 30(b)(6) witness on police
21 procedures, testified that it is standard procedure for the police

22 ¹⁰The withdrawals from Contingent Fund B might contribute to
23 this finding. On the other hand, a fact-finder could credit
24 Goldberg's testimony that the money was used for witness travel.
25 The ledger entry of the \$1,250 payment indicates it was for witness
26 expenses and the payment was made in early October, 1999 when
27 Masina traveled from Samoa to the United States to provide an in-
28 person taped statement of her account of Shannon's homicide. See
Masina Dec. and Wong Dec., Ex. LL, Tennison's Preliminary Hearing
at 54 (Shortly after the Shannon homicide, Masina left the United
States to live in Samoa).

1 to turn over everything to the district attorney's office. The
2 district attorney discloses everything to the defense. Balogh Dec.,
3 Ex. 81, Tabak Depo. at 48. Tabak also stated that it is not SFPD's
4 policy for the investigator who is aware of exculpatory evidence to
5 leave it in the police case file and assume that if the district
6 attorney is interested, he would come to the SFPD where the file is
7 located and look at it. Id. at 99. Instead, Tabak stated, the
8 investigator should make an effort within a reasonable amount of
9 time to reveal that exculpatory information to the district
10 attorney. Id.

11 Tabak's testimony is sufficient to raise a dispute of fact
12 regarding whether the Inspectors negligently or intentionally
13 withheld the memo by placing it in the police case file instead of
14 turning it over to Butterworth.

15 Because there are disputes of material fact regarding whether
16 the SWP memo was exculpatory and whether the Inspectors intended to
17 withhold it, the cross motions for summary judgment on the issue of
18 liability are DENIED.

19 (3) Qualified Immunity¹¹

20 The Inspectors argue that even if they committed a
21 constitutional violation, qualified immunity protects them from
22 liability.

23 As discussed above, at the time this conduct took place the law
24 regarding the Inspectors' duty to turn over to the prosecutor
25 exculpatory information was well-established. If the SWP memo was

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27 ¹¹The Inspectors do not argue that absolute immunity applies to
28 this claim.

1 exculpatory, a reasonable officer would know that it was necessary
2 to turn it over directly to the district attorney. Therefore,
3 disputed facts regarding the memo's exculpatory value preclude
4 summary judgment on whether the Inspectors' conduct was reasonable
5 under the circumstances. The Inspectors' motion for summary
6 judgment of qualified immunity for failure to disclose the SWP memo
7 is DENIED.

8 D. Luther Blue's Interviews and Pauline's Polygraph

9 Only the Inspectors move for summary judgment on these claims.
10 They argue that they fulfilled their Brady obligations by providing
11 the video tapes of each of their two interviews with Luther Blue to
12 Butterworth, that Butterworth himself ordered Pauline's polygraph
13 and that they informed him of the results. Tennison concedes that
14 the Inspectors' conduct in regard to the Blue interviews and
15 Pauline's polygraph are not independent grounds for liability under
16 Brady. Tennison Opp. at 57. Goff does not address the Blue
17 interview. Goff argues that the polygraph was material exculpatory
18 evidence, but doesn't address how the Inspectors could be liable for
19 failure to disclose it to Butterworth given that Butterworth knew of
20 it. Therefore, the Court GRANTS the Inspectors' motion for summary
21 judgment on Plaintiffs' Brady claims to the extent they are based on
22 suppression of the Blue interviews and Pauline's polygraph.

23 E. Materiality

24 Plaintiffs argue that they are entitled to summary judgment on
25 the element of materiality on all of their Brady claims.

26 As discussed above, in the context of a Brady violation,
27 evidence is material "if there is a reasonable probability that, had
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1 the evidence been disclosed to the defense, the result of the
2 proceeding would have been different." Bagley, 473 U.S. at 682.

3 In the Habeas Order, the Court undertook an extensive review of
4 the case the prosecution presented against Tennison to the jury and
5 concluded that it was weak. Habeas Order at 72-80. The Inspectors
6 do not present additional evidence on this issue nor do they argue
7 that the prosecution's case was strong. Therefore, the Court adopts
8 here the finding that the prosecution's case against Tennison was
9 weak. The Court also finds the prosecution's case against Goff was
10 weak because there was only one eyewitness who identified Goff,
11 instead of two eyewitnesses who identified Tennison.

12 However, because materiality is to be considered in terms of
13 the collective effect of the suppressed evidence, it is premature to
14 determine materiality before a jury resolves the disputed factual
15 issues as to what evidence is suppressed and who is liable for it.
16 Therefore, even though the case against Plaintiffs was weak, the
17 Court will not summarily adjudicate the materiality of the
18 suppressed evidence.

19 F. Causation

20 The parties cross-move for summary adjudication as to whether
21 the Inspectors' alleged failure to disclose exculpatory evidence to
22 the prosecutor caused Plaintiffs' injury.

23 To establish a civil rights violation, the plaintiff must show
24 that the defendant's unconstitutional conduct was the actual and
25 proximate cause of the plaintiff's injuries. White v. Roper, 901
26 F.2d 1501, 1505 (9th Cir. 1990); Van Ort v. Estate of Stanewich, 92
27 F.2d 831, 836-37 (9th Cir. 1996); Arnold v. Int'l Business Machines

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1 Corp., 637 F.2d 1350, 1355 (9th Cir. 1981). The defendant's conduct
2 is the actual cause of the injury only if the injury would not have
3 occurred "but for" that conduct. White, 901 F.2d at 1505. If it is
4 established that the conduct was one of the causes of the
5 plaintiff's injury, the next question is whether the conduct is the
6 proximate cause of the injury. Id. at 1506. The defendant's
7 conduct is not the proximate cause of the injury if another cause
8 intervenes and supercedes the defendant's liability for the
9 subsequent events. Id.; Van Ort, 92 F.2d at 837 (traditional tort
10 law defining intervening causes that break the chain of proximate
11 causation applies in § 1983 actions); Arnold, 637 F.2d at 1355
12 (same). Whether the conduct of another person is an intervening
13 cause of the plaintiff's injuries depends upon what was reasonably
14 foreseeable to the defendant at the time. White, 901 F.2d at 1505.
15 Foreseeable intervening causes will not supersede the defendant's
16 responsibility. Id.

17 The Inspectors offer many reasons for their argument that they
18 are not the legal or the proximate cause of Plaintiffs' injuries:
19 witnesses were untruthful during the investigation, Plaintiffs'
20 defense counsel failed to investigate and present an adequate
21 defense, the courts ruled adversely on the allegedly suppressed
22 Ricard confession and Plaintiffs failed to use their own knowledge
23 of the alleged facts to defend themselves.

24 Plaintiffs respond that the Habeas Order provides the best
25 template for analysis of causation. However, in the habeas case the
26 issue of causation was not addressed.

27 As discussed above in the context of liability, the Court has
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1 found disputed issues of material facts in regard to many of the
2 same arguments the Inspectors raise here. The factual dispute is
3 compounded here because the Inspectors' ability to foresee any of
4 the alleged intervening events must be determined. Therefore, the
5 Court finds that disputed issues of material facts preclude summary
6 adjudication for either side of the issue of causation.

7 III. The Inspectors' Motion for Summary Judgment on Fabrication of
8 Evidence and Continued Investigation Claim

9 Only the Inspectors move for summary judgment on Plaintiffs'
10 claim that the Inspectors fabricated evidence in their interviews of
11 Masina and Pauline and continued their investigation of Plaintiffs
12 even though they knew or should have known that Plaintiffs were
13 innocent.

14 (A) Absolute Immunity

15 The Inspectors argue that Hendrix is absolutely immune from
16 Tennison's claim that he allegedly coerced Pauline into committing
17 perjury during the April, 1990 interviews.¹²

18 As discussed in relation to Butterworth's motion for summary
19 judgment, the Court has found that Butterworth acted as a prosecutor
20 and not as an investigator during the April 20 through April 22,
21 1990 interviews of Pauline about her recantation. At these
22 interviews, Hendrix was working primarily at Butterworth's
23 direction. However, Butterworth testified that he did not direct
24 Hendrix to arrange the telephone conversation between Pauline and
25 Masina after Pauline took the polygraph examination. Hendrix has

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27 ¹²Sanders was not present at the interviews and Pauline did not
28 testify about Goff.

1 not pointed to any contrary evidence. Therefore, Hendrix was not
2 under Butterworth's direction when he arranged the phone call and
3 cannot claim that he was acting as a prosecutor in doing so. Thus,
4 Hendrix is absolutely immune from Plaintiffs' claim regarding his
5 actions during the April 20 through April 22, 1990 interviews of
6 Pauline, except for his conduct in setting up the phone call between
7 Masina and Pauline.

8 (B) Constitutional Violation

9 As discussed above, to prevail on a fabrication of evidence
10 claim, a plaintiff, at a minimum, must show that (1) the officer
11 continued his investigation despite the fact he knew or should have
12 known that the suspect was innocent or (2) the officer used
13 investigative techniques that were so coercive and abusive that he
14 knew or should have known that they would yield false information.
15 Devereaux, 263 F.3d at 1076. Suggestive interview tactics alone do
16 not amount to a constitutional violation. Gausvik, 345 F.3d at 817.

17 (1) Phone Call Between Pauline and Masina

18 Plaintiffs argue that it was coercive for Hendrix to allow
19 Pauline to participate in an unmonitored conversation with Masina,
20 the person Pauline said had pressured her to lie. As evidence, they
21 point to Hendrix' deposition testimony that good interview
22 techniques require witnesses to be interviewed separately and that
23 he himself never put witnesses in a room together allowing them to
24 talk over their respective testimony. Wong Dec., Ex. B, 2005
25 Hendrix Depo. at 37-40.

26 In his declaration, Hendrix states that, after the polygraph,
27 Pauline asked him if she could speak to Masina, who was then living
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1 in Samoa. Hendrix states he arranged the call and didn't monitor it
2 because he "believed the girls were friends, and did not see
3 anything improper in allowing two witnesses who had already given
4 statements about the murder to speak." Hendrix Dec. at ¶ 23.
5 Butterworth testified that he was not concerned that Pauline spoke
6 with Masina over the telephone because Masina was in Samoa at the
7 time so it was unlikely that she would be able to pressure or coerce
8 Pauline. Wong Dec., Ex. O, Butterworth Depo. at 334-35.
9 Butterworth also stated that Hendrix had told him that Pauline had
10 asked to speak to Masina and Butterworth thought it was unlikely
11 that Pauline would make such a request if she felt threatened by
12 Masina. Id. at 335. Pauline stated that it was not her idea to
13 speak to Masina, that Hendrix just handed her the phone and said
14 that there was a phone call for her from Masina. Wong Dec., Ex. M,
15 Pauline Depo. at 98-99.

16 Thus, there is a dispute of fact regarding whether Pauline
17 asked to speak to Masina. However, even if Pauline had requested to
18 speak to Masina, it can be inferred that Hendrix knew or should have
19 known that this unmonitored phone call could yield false
20 information. Thus, a jury could find that Hendrix committed a
21 constitutional violation. However, Tennison has not carried his
22 burden of showing there is clearly established law regarding
23 allowing witnesses to talk to each other. Thus, even if a
24 constitutional violation was committed, a reasonable officer in
25 Hendrix' position would not have been aware that he was violating
26 Plaintiffs' constitutional rights. The Inspectors' motion for
27 summary adjudication that Hendrix is qualifiedly immune on this
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1 claim is GRANTED.

2 (2) Continued Investigation

3 Opposing the Inspectors' motion for summary adjudication that
4 they did not commit a constitutional violation in this regard,
5 Plaintiffs argue that, because it was obvious that Masina and
6 Pauline were lying, the Inspectors knew it. No other credible
7 evidence tied Plaintiffs to Shannon's murder and thus, Plaintiffs
8 argue, the Inspectors continued their investigation of Plaintiffs
9 despite the fact that they knew that Plaintiffs were innocent.

10 The Inspectors argue that no evidence shows that they knew
11 Plaintiffs were innocent and point to a great deal of evidence that
12 shows that they reasonably believed, based on the statements of
13 Masina and Pauline, that Plaintiffs were guilty. The Inspectors
14 point out that there were sufficient reasons for them to believe
15 that Masina was credible because: (1) her account of the murder
16 never changed; (2) she had no motive to make up this story;
17 (3) neighborhood witnesses corroborated the chase route and vehicles
18 she described; (4) she admitted to having been in a stolen car, even
19 though she could have faced criminal liability; (5) other witnesses
20 corroborated aspects of her story; (6) the forensic evidence
21 established that Shannon received two shots from a shotgun,
22 consistent with what Masina described; (7) police found Shannon's
23 body in the corner of the parking lot as Masina had described it;
24 (8) Masina did not benefit from testifying against Plaintiffs;
25 (9) Masina put herself and her family at risk by testifying; and
26 (10) a neighborhood witness indicated that she saw a Filipina girl
27 matching Masina's description who did not look like she belonged

1 with the rest of the individuals who were near the scene of the
2 shooting. The Inspectors argue that there were sufficient reasons
3 for them to believe Pauline because: (1) during her first police
4 interview, she identified Tennison from a photo line-up; (2) at that
5 same interview, she identified an individual named Wayland Gibson,
6 whose street name was "Buck," as having been present at the murder
7 and Masina had said she heard someone say, "Buck, come here," just
8 before the car chase began; (3) Pauline's story that Masina forced
9 her to lie did not add up because shortly after the murder Pauline
10 moved to Hawaii and Masina moved to Samoa and it was not reasonable
11 to believe Masina could have exerted influence from thousands of
12 miles away; (4) Pauline's denial that she was in a stolen car before
13 the murder did not mar her credibility because she may have been
14 afraid this would get her into trouble; and (5) she may have
15 recanted her original story because she was afraid of retaliation.

16 As Plaintiffs point out, some of the reasons the Inspectors
17 give for believing Masina and Pauline are questionable. For
18 instance, as the Court noted in the October 26, 2003 Habeas Order,
19 the Inspectors' theory that neighborhood witnesses corroborated
20 Masina's story is weak given that some neighborhood witnesses
21 contradicted aspects of her statement and that Masina's and
22 Pauline's stories were inconsistent with each other. See Purcell
23 Dec., Ex. 52, August 26, 2003 Habeas Order at 72, 77-79.
24 Nonetheless, even if Pauline and Masina were lying, that is not
25 sufficient evidence that Plaintiffs were innocent to compel a
26 conclusion that the Inspectors continued their investigation of
27 Plaintiffs when they knew or should have known them to be innocent.

1 Plaintiffs have cited no case in which a claim like this one
2 prevailed. Although Devereaux, 263 F.3d at 1074-75, held that there
3 is a clearly established constitutional due process right not to be
4 criminally charged on the basis of false evidence deliberately
5 fabricated by the government, it found that the defendants had not
6 violated such a right. Id at 1077, 1079. The plaintiff in
7 Devereaux had based his constitutional claim on the first Devereaux
8 prong: coercive interview techniques. The Court has found only
9 three cases addressing the second Devereaux prong of continued
10 investigation, and all those cases have held the defendant did not
11 commit a constitutional violation. See Cunningham, 345 F.3d at 811-
12 12 (continued investigation not unconstitutional); Milstein, 208 F.
13 Supp. 2d at 1123-24 (defendants entitled to qualified immunity due
14 to insufficient evidence to support claim that they knew or should
15 have known plaintiff was innocent); Guerrero v. City and County of
16 San Francisco, 2003 WL 22749099, *10 (N.D. Cal 2003) (no reasonable
17 juror could find that defendant knew or should have known that
18 plaintiff was innocent).

19 Although the information the Inspectors uncovered in their
20 investigation was contradictory and somewhat inconsistent, no
21 evidence supports Plaintiffs' claim that the Inspectors knew or
22 reasonably should have known that Plaintiffs were innocent. In
23 Milstein, 208 F. Supp. 2d at 1123, the plaintiff had been indicted
24 by a Grand Jury and later held to answer after a preliminary
25 hearing. The court relied on these facts for its conclusion that
26 there was evidence to support the defendants' belief that the
27 plaintiff was guilty of the crimes charged. Id. Here, too,

1 Plaintiffs were held to answer after preliminary hearings on the
2 crimes charged. Significantly, at Goff's preliminary hearing, the
3 court found probable cause even though Pauline testified to her
4 recantation. Furthermore, although this Court granted Tennison's
5 habeas petition, it did so based on Brady violations; the Court did
6 not address the issue of Tennison's guilt or innocence.

7 The Court concludes that the Inspectors did not violate
8 Plaintiffs' constitutional right to be free from being charged with
9 fabricated evidence by continuing their investigation of Plaintiffs.
10 Furthermore, even if the Inspectors' conduct constituted a
11 violation, a reasonable officer in their position would not have
12 known that they were violating Plaintiffs' constitutional rights.
13 Therefore, the Inspectors' motion for summary adjudication based on
14 their continuing investigation of Plaintiffs is GRANTED.

15 F. Punitive Damages

16 The Inspectors move for summary adjudication of Plaintiffs'
17 demand for punitive damages.

18 Punitive damages may be awarded in a § 1983 suit "when the
19 defendant's conduct is shown to be motivated by evil motive or
20 intent, or when it involves reckless or callous indifference to the
21 federally protected rights of others." Smith v. Wade, 461 U.S. 30,
22 56 (1983). In Dang v. Cross, 422 F.3d 800, 807-08 (9th Cir. 2005),
23 the Ninth Circuit held that punitive damages may be awarded in
24 federal civil rights cases when the defendant's conduct is
25 oppressive or malicious or in reckless disregard of the plaintiff's
26 rights. Malicious conduct is accompanied by ill will or spite or is
27 done for the purpose of injuring the plaintiff. Id. at 809 (citing

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1 Ninth Circuit Model Civil Jury Instruction 7.5). Reckless conduct
2 in conscious disregard of the plaintiff's rights reflects complete
3 indifference to the plaintiff's safety or rights or is done in the
4 face of a perceived risk that the conduct will violate the
5 plaintiff's rights under federal law. Id. (citing same jury
6 instruction). Conduct is oppressive if it injures or damages the
7 plaintiff or violates the plaintiff's rights with unnecessary
8 harshness or severity as by misuse or abuse of authority or power or
9 by taking advantage of the plaintiff's weakness, disability or
10 misfortune. Id. at 809-10. Although the standard for compensatory
11 and punitive damages is overlapping, the distinction is that
12 compensatory damages are mandatory once a violation is found, but
13 the award of punitive damages requires a discretionary moral
14 judgment that the conduct merited the particular punitive award
15 imposed in addition to the compensatory award. Larez v. City of Los
16 Angeles, 946 F.2d 630, 648-49 (9th Cir. 1991) (citing Smith, 461
17 U.S. at 52).

18 Relying on the same arguments discussed above, the Inspectors
19 contend that there is no evidence that they acted recklessly or
20 maliciously in regard to Plaintiffs' right to a fair trial.

21 Because the award of punitive damages turns on the intent of
22 the Inspectors, it, like other questions where motive is at issue,
23 cannot be resolved on summary judgment. If the jury were to find
24 for Plaintiffs on the disputed facts and draw inferences in
25 Plaintiffs' favor, such findings could support an award of punitive
26 damages. Plaintiffs have raised a disputed issue of fact regarding
27 whether the Inspectors acted oppressively, recklessly or with

1 callous disregard for Plaintiffs' constitutional rights. Therefore,
2 the Inspectors' motion for summary adjudication on the request for
3 punitive damages is DENIED.

4 CONCLUSION

5 Based on the foregoing, Butterworth's motion for summary
6 judgment (Docket # 201) is GRANTED in part, the Inspectors' motion
7 for summary judgment (Docket # 215) is GRANTED in part, Plaintiffs'
8 motion to strike (Docket # 298) is DENIED and Plaintiffs' motions
9 for partial summary adjudication (Docket ## 152, 155) are DENIED.
10 The Inspectors' request to file a separate statement of disputed and
11 undisputed facts is DENIED (Docket # 215). The only remaining claim
12 against Butterworth is Goff's Brady claim for suppression of the
13 Ricard confession. The claims remaining against the Inspectors are
14 Plaintiffs' Brady claims based on the suppression of Ricard's
15 confession, Smith's statements, the SWP memo and Hendrix' April 23,
16 1990 phone call with Masina.

17
18 IT IS SO ORDERED.

19 Dated 3/22/06

20 _____



21 CLAUDIA WILKEN
22 United States District Judge
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